IDAMAN PELITA SDN BHD v. KETUA PENGARAH HASIL DALAM NEGERI

HIGH COURT MALAYA, KUALA LUMPUR
FAIZAH JAMALUDIN J
[CIVIL APPEAL NO: R1-14-12-09-2013]
28 FEBRUARY 2022

Abstract – *Pursuant to the self-assessment regime of the Income Tax Act 1967 ('ITA'), a taxpayer is obliged, under s. 77A of the ITA, to submit the correct amount of income received in the tax returns furnished to the Director General of Inland Revenue ('DGIR') for every year of assessment. Upon the taxpayer's wilful default in not reporting disposal of land within the statutory period under the ITA, the DGIR is empowered to make assessment after a six-year limitation period.*

REVENUE LAW: *Income tax – Assessment – Appeal against decision of Special Commissioners of Income Tax – Whether Director General of Inland Revenue ('DGIR') correct in raising notice of assessment – Whether taxpayer failed to declare income received under agreement within statutory period of six-years – Whether agreement was joint venture agreement – Whether wilful default in failing to declare income – Whether DGIR correct in making assessment after six-year limitation period – Whether imposition of penalty justified – Income Tax Act 1967, ss. 91(3), 113(1) & (2)*

REVENUE LAW: *Income tax – Special Commissioners of Income Tax ('SCIT') – Appeal against decision of SCIT – Hearing pursuant to Schedule 5 of Income Tax Act 1967 ('ITA') – Whether provisions relating to the examination of witnesses applies to hearings before SCIT – Whether SCIT has power to summon or not to summon any witness – Whether SCIT has discretion to admit or reject evidence adduced – Whether power subject to sub-s. 142(5) of ITA*

This was an appeal by the taxpayer by way of case stated by the Special Commissioners of Income Tax ('SCIT') against the SCIT's deciding order. The taxpayer, principally engaged in property development, purchased a plot of land. On 2 February 1999, the taxpayer executed a joint venture agreement ('JVA') with Luxor Properties Sdn Bhd ('Luxor Properties'). The amount of consideration from Luxor Properties to the taxpayer under the JVA was not expressed as a fixed figure. The taxpayer also gave a power of attorney to Luxor Properties to carry out development of the land and to obtain bridging loan as well as to do all necessary matters in relation to the development and sale of properties erected on the land. The title in the land was never transferred to Luxor Properties and the taxpayer was tasked with the responsibility of effecting the transfers of title to future end purchasers. The taxpayer had always been submitting its accounts and income tax return based on the percentage of completion basis and this had been accepted by

A the Director General of Inland Revenue ('DGIR'). The taxpayer never declared or reported any income from the alleged outright sale *via* the JVA in its annual accounts ended 30 June 1999, 2000, 2001, 2002, 2003, 2004 or 2005 for its tax computation prior to 27 January 2006. In 2005, the taxpayer's tax agent reviewed the taxpayer's tax files and was of the view that B the income derived by the taxpayer from the JVA should be declared as income that had been accrued in the basis year 1999 and that the JVA should be deemed to be an outright sale of the taxpayer's land and not be treated as a joint venture between the taxpayer and Luxor Properties despite the express provisions in the JVA. The taxpayer's tax agent was of the view that C as the consideration for the JVA was deemed to be the taxpayer's income for the basis year 1999, no tax was to be paid by the taxpayer as all income derived and accruing in the basis year 1999 was exempt from income tax since that is what is commonly known as the 'waiver year' whereby no tax was imposed on all income derived or accrued for the basis year 1999 when the Malaysian taxation system was changed from the preceding basis year to D the current year basis with effect from 1 January 2000. On 23 March 2010, the DGIR accepted the taxpayer's contention that the JVA was an outright sale and purchase of the land and raised an assessment for the year of assessment 2001 ('YA 2001') with penalty. The reason given by the DGIR for raising the assessment for YA 2001 was that the condition precedents to E the JVA as provided in cl. 6 of the JVA were satisfied in 2001. As a result of the taxpayer's letter dated 27 January 2006, the DGIR raised the notice of assessment for YA 2001 and imposed a penalty on the taxpayer for its neglect in not reporting the disposal of land within the statutory period of six years which is computed as commencing from 1999 and ending in 2005. F The taxpayer filed an appeal to the SCIT against the notice of assessment raised by the DGIR against the taxpayer. After the hearing of the appeal, the SCIT dismissed the taxpayer's appeal and upheld the DGIR's assessment for YA 2001. Dissatisfied, the taxpayer filed this appeal under para. 34 of Schedule 5 of the Income Tax Act 1967 ('ITA').

G **Held (dismissing appeal by taxpayer):**

(1) An appeal by way of case stated from a deciding order of the SCIT is only on questions of law. The findings of primary facts and inferences of pure fact by the SCIT were unassailable. It was only inferences made by the SCIT which involved assumptions as to the legal effect H or consequences of primary facts, which can be overturned or set aside by the High Court, if they are found to be erroneous, since such inferences involve a question of law. Therefore, the fact that there existed the evidence that was undisputed by the DGIR at the hearing before the SCIT, should not be a reason for this court to order the I production of the notes of evidence. Additionally, the fact that the DGIR was entitled to 'dispute the NOE and to present any submission as the DGIR sees fit so as to resist successfully' should also not be the

basis for this court to order the production of the notes of evidence. By considering the notes of evidence, this court would be taking on the role of a trial judge and not that of an appellate court in an appeal by way of case stated. (paras 20, 25, 26 & 34)

(2) To enable the transition from the preceding year basis assessment to current year basis assessment, pursuant to s. 8 of the Income Tax (Amendment) Act 1999 ('1999 Amendment Act'), tax on the income earned for the YA 2000 (except for dividends and income subject to final withholding tax) was waived. Under s. 17 of the 1999 Amendment Act, there are two years of assessment for year 2000: (i) YA 2000 (preceding year basis) in respect of income earned in the basis period ending in 1999; and (ii) YA 2000 (current year basis) in respect of income earned in the basis period ending in 2000. There is no tax payable for income earned in the basis period of 1999. Hence, if the debt owing by Luxor Properties to the taxpayer under the agreement was treated as the taxpayer's gross income in 1999, the taxpayer would not have to pay any tax for the sum it had received from Luxor Properties under the agreement. (paras 56-58)

(3) At the time of the taxpayer's filing of the revised tax returns on 27 January 2006 and the issuance of the notice of assessment by the DGIR in 2010, ss. 77A and 90 of the ITA, as amended by the Income Tax (Amendment) Act 2002 ('2002 Amendment Act'), were in effect. Hence, pursuant to the new self-assessment provisions introduced by the Income Tax (Amendment) (No. 2) Act 1999, the taxpayer should have filed a tax return declaring the consideration for the land as income earned in 2001, within six months from the close of its accounting period for YA 2001. (para 65)

(4) The taxpayer and Luxor Properties had agreed to enter into an unincorporated joint venture to allow Luxor Properties to develop commercial/retail space and affordable service apartments on the land upon the terms and conditions in the agreement. The provisions in the preamble of the agreement and in cl. 1.1 were in line with cl. 9.3, where both the taxpayer and Luxor Properties agreed to be parties to the sale and purchase agreements ('SPAs') with the purchasers of the units built in the project. Under cl. 9.3.1, the SPAs with the purchasers of the units contained recitals that the taxpayer was the registered and beneficial owner of the land and that the taxpayer had granted Luxor Properties the absolute right to develop the land. (paras 85 & 86)

(5) The aggregate value of the project would only matter to the taxpayer, if the agreement was a joint venture agreement where the consideration to be received by the taxpayer was tied to the agreed value of the project. The agreement did not state a fixed figure that Luxor

Properties was to pay for the land. Instead, cl. 8.1 stated that the landowner shall be entitled to 20% of the aggregate sale prices of the saleable space of the first phase of the project, and 25% of the aggregate sale prices of the saleable space of each subsequent phase of the project. Accordingly, the agreement was a joint venture agreement between the taxpayer and Luxor Properties whereby the latter agreed to develop the project on the land in accordance with the terms and conditions of the agreement. (paras 88 & 92)

(6) Although cl. 6.2 of the agreement stated that Luxor Properties was entitled to waive any of the conditions precedent in cl. 6.1 by giving a written notice to the taxpayer of the waiver, the law is settled that a condition precedent required by law or policy could not be waived. The development order and all the necessary approvals, licence and permits for the development of the project are required by law *ie*, the Town and Country Planning Act 1976. Without the development order, Luxor Properties would not be able to develop the project. Therefore, the condition in cl. 6.1.1 is a contingent condition and hence, pursuant to s. 33(a) of the Contracts Act 1950, the agreement was a conditional contract. Accordingly, the SCIT's finding of fact that the agreement was a conditional agreement and that the condition was fulfilled on 28 May 2001, when the development order was obtained, was correct at law. (paras 100, 103, 104 & 106)

(7) The 12 years period for the issuance of assessment or additional assessment by the DGIR prior to 1 January 2000 was reduced to six years with effect from 1 January 2000 pursuant to the amendment made to s. 91 of the ITA by s. 15 of the Finance Act 1998. It was further reduced to five years with effect from 10 January 2013 pursuant to the amendment made to s. 91 of the ITA by s. 26 of the Finance Act 2013. Accordingly, at the time the DGIR had issued the assessment in 2010 against the taxpayer in respect of its income for YA 2001, the limitation period for which the DGIR was to issue the assessment was six years from the YA 2001. (paras 115 & 116)

(8) The SCIT, similar to an arbitral tribunal, is an inferior tribunal; it is not a court and hence, the Evidence Act does not apply to proceedings before the SCIT. It follows that provisions relating to the examination of witnesses, including cross-examination, in the Evidence Act 1950 as well as case laws on examination of witnesses, do not apply to hearings before the SCIT. Further, the hearing of appeals to the SCIT was made pursuant to Schedule 5 of the ITA and hence, the SCIT has the power to summon or not to summon any witness to attend the hearings. It also has the discretion to admit or reject any evidence adduced, whether oral or documentary and whether admissible or inadmissible under any written law. This power is only subject to sub-s. 142(5) of the ITA. (paras 126-128 & 131)

(9) The agreement was for the outright sale of the land and the income earned in 1999 and therefore, it was highly negligent of the taxpayer to have filed tax returns, prior to 27 January 2006, stating that it did not earn any income for the sale of the land. The failure to file correct tax returns of income earned in any year of assessment amounts to neglect and wilful misconduct. Even if the wilful misconduct was made by the taxpayer's agent on the taxpayer's behalf, under s. 91(3) of ITA, the DGIR may make an assessment outside the six-year limitation period for purposes of making good the loss of tax attributable to the tax agent's fraud or wilful misconduct or the taxpayer's negligence. The DGIR had proven that the taxpayer had committed wilful default or had been negligent in failing to declare the income received under the agreement in its tax returns for YA 2001. Hence, the DGIR was not erroneous in making the assessment pursuant to s. 91(3) of ITA after the six-year limitation period. Accordingly, the SCIT had not erred in law in upholding the DGIR's decision of issuing the assessment for YA 2001 in 2010. (paras 149, 150, 154 & 155)

(10) Where a person makes an incorrect return by omitting or understating any income, if no prosecution had been instituted against the person under s. 113(1) of the ITA, the DGIR is empowered under s. 113(2) of the ITA to require that person to pay a penalty equal to the amount of tax undercharged in consequence of the incorrect return or incorrect information, or which would have been undercharged, if the return or information had been accepted as correct. The SCIT was justified in law in reaching the conclusion that the DGIR had lawfully and correctly imposed upon the taxpayer the penalty under s. 113(2) of the ITA. (paras 157 & 161)

Case(s) referred to:

Aberfoyle Plantations Ltd v. Khaw Bian Cheng [1959] 1 LNS 3 ***(refd)***
ADSB v. Ketua Pengarah Hasil Dalam Negeri [2011] AMTC 1242 ***(refd)***
Blyth v. Birmingham Waterworks (1856) 11 Ex Ch 781 ***(refd)***
Chase Perdana Bhd v. Md Afendi Hamdan [2009] 6 CLJ 501 FC ***(refd)***
Chong Woo Yit v. Government Of Malaysia [1989] 2 CLJ 87; [1989] 1 CLJ (Rep) 9 SC ***(refd)***
Chua Lip Kong v. Director-General Of Inland Revenue [1981] 1 LNS 157 ***(refd)***
Cooper v. Stubbs [1925] 10 TC 29 ***(refd)***
Edwards (HM Inspector of Taxes) v. Bairstow & Harrison [1955] 36 TC 207 ***(refd)***
Employee v. Revenue and Customs Commissioners [2008] STC (SCD) 688 ***(refd)***
Far East Holdings Bhd & Anor v. Majlis Ugama Islam Dan Adat Resam Melayu Pahang & Other Appeals [2018] 1 CLJ 693 FC ***(refd)***
Government Of Malaysia v. Gan Chuan Lian [1992] 1 CLJ 678; [1992] 2 CLJ (Rep) 424 HC ***(refd)***
Government Of Malaysia v. Ng Song Choon [1974] 1 LNS 41 HC ***(refd)***
Hudson v. Humbles 42 TC 380 ***(refd)***

Ideal City Development Sdn Bhd v. Dynamic Mould Sdn Bhd [2003] 3 CLJ 201 CA ***(refd)***
King v. Walden (HM Inspector of Taxes) [2001] STC 822 ***(refd)***
Knight v. Inland Revenue Commissioners [1973] 3 All ER 721 ***(refd)***
Langkawi R & D Academy Sdn Bhd v. Ketua Setiausaha, Kementerian Pertahanan Malaysia & Ors [2013] 3 CLJ 1006 CA ***(refd)***
Lucy Wong Nyuk King & Anor v. Hwang Mee Hiong [2016] 4 CLJ 813 FC ***(refd)***
Malaysian Newsprint Industries Sdn Bhd v. Perdana Cigna Insurance Bhd & Ors [2008] 1 CLJ 246 CA ***(refd)***
Morello Sdn Bhd v. Jaques (International) Sdn Bhd [1995] 2 CLJ 23 FC ***(refd)***
National Land Finance Co-operative Society Ltd v. Sharidal Sdn Bhd [1983] 2 CLJ 76; [1983] CLJ (Rep) 282 FC ***(refd)***
NTS Arumugam Pillai v. Director-General Of Inland Revenue [1976] 1 LNS 78 HC ***(refd)***
NTS Arumugam Pillai v. Director-General Of Inland Revenue [1977] 1 LNS 77 FC ***(refd)***
PP v. Chew Siew Luan [1982] CLJ 354; [1982] CLJ (Rep) 285 FC ***(refd)***
Regina v. Special Commissioners of Income Tax (ex parte Martin) [1973] 1 WLUK 491 ***(refd)***
Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case [2017] 5 CLJ 526 FC ***(refd)***
Silver Concept Sdn Bhd v. Brisdale Rasa Development Sdn Bhd [2005] 3 CLJ 259 CA ***(refd)***
Syarikat Ibraco-Peremba Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2015] 10 CLJ 114 CA ***(refd)***
Trans Trust SPRL v. Danubian Trading Co Ltd [1952] 2 QB 297 ***(refd)***
UHG v. Director General Of Inland Revenue [1974] 1 LNS 181 FC ***(refd)***
Wong Swee Chin v. PP [1980] 1 LNS 138 FC ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 24, 32, 33(a), 34, 35, 36, 37
Courts of Judicature Act 1964, s. 67(1)
Evidence Act 1950, s. 2
Finance Act 1998, s. 15
Finance Act 2013, s. 26
Income Tax (Amendment) Act 1999, ss. 8, 17
Income Tax Act 1967, ss. 24(1)(a), 77(1A), (1C), 77A, 77B, 90(1A), 90(1B)(a), (b), 91(1), (3), 102(4), 107C, 113(1), (2), 142(5)(b), Schedule 5 paras. 19, 22, 23, 34, 37(a), 39(c), 41
Interpretation Acts 1948 and 1967, ss. 3, 8(1)
Town and Country Planning Act 1976, s. 19

Income Tax Act 1952 [UK], ss. 47(1), 229(3)
Taxes Management Act 1970 [UK], s. 29(4)

Other source(s) referred to:
Whiteman on Income Tax, 3rd edn, p 1361

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Reported by S Barathi

JUDGMENT

Faizah Jamaludin J:

Introduction

[1] This is an appeal to the High Court by Idaman Pelita Sdn Bhd ("the taxpayer") by way of case stated by the Special Commissioners of Income Tax ("SCIT") against the SCIT's deciding order made on 30 November 2012 ("deciding order").

[2] The taxpayer had filed an appeal to the SCIT against a notice of assessment dated 23 March 2010 raised by the Director General of Income Tax ("DGIR") against the taxpayer for the year of assessment 2001 ("YA 2001") comprising of income tax payable in the sum of RM4,484,259.64 and penalty in the sum of RM1,345,277.89.

[3] After the hearing of the appeal, the SCIT dismissed the taxpayer's appeal and upheld the DGIR's assessment for YA 2001.

[4] Dissatisfied with the SCIT's decision, the taxpayer filed this appeal to the High Court under para. 34 of Schedule 5 of the Income Tax Act 1967 ("ITA").

[5] The law is settled that appeals to the High Court against the deciding orders of the SCIT are on questions of law only: see *Edwards (HM Inspector of Taxes) v. Bairstow & Harrison* [1955] 36 TC 207; [1956] AC 14; *Chua Lip Kong v. Director-General Of Inland Revenue* [1981] 1 LNS 157; [1982] 1 MLJ 235, PC; *UHG v. Director-General Of Inland Revenue* [1974] 1 LNS 181; [1974] 2 MLJ 33, FC.

[6] Paragraph 34 of Schedule 5 of ITA states that parties to the proceedings before the SCIT may appeal on a question of law against the deciding order. Paragraph 34 of Schedule 5 reads as follows:

> 34. (1) **Either party to the proceedings before the Special Commissioners may appeal to the High Court on a question of law against a deciding order made in those proceedings** (including a deciding order made pursuant to sub-paragraph 26(b) or (c) **by requiring the Special Commissioners to state a case for the opinion of the High Court** and by paying to the Clerk at the time of making the requisition such fee as may be prescribed from time to time by the Minister in respect of each deciding order against which he seeks to appeal.
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> (emphasis added)

[7] In this instant appeal, the question of law referred to the High Court by the SCIT in their case stated dated 20 August 2013 ("case stated") was:

> The question for the opinion of the High Court is whether on the facts as stated by us, our decision is correct in law.

[8] At the conclusion of the appeal, this court found that the SCIT's deciding order was correct in law, and accordingly, dismissed the taxpayer's appeal.

[9] The court's findings were highlighted in the written decision issued at the conclusion of the hearing of the appeal. The full reasons for the court's findings and dismissal of the appeal are set out in this judgment.

The Facts

[10] In every case stated, the SCIT are required to state the findings of facts on which their decision is based. Paragraph 37(a) of Schedule 5 of ITA stipulates that case stated under para. 34 of Schedule 5 of ITA "shall set forth the facts as found by the Special Commissioners, the deciding order and the grounds of their decision."

[11] The findings of facts in the case stated consist of admitted or agreed facts and proved facts before the SCIT. These admitted/agreed facts and proved facts are primary facts found by the SCIT. The SCIT may make inferences from the admitted/agreed facts and the proved facts. And where these inferences by the SCIT involve assumptions as to the legal effect or consequences of the primary facts, they are questions of law, for the High Court's consideration in an appeal by way of case stated. If it is shown that the SCIT had proceeded upon an erroneous assumption as to the relevant law, it is a function of the High Court on consideration of the case stated to correct the SCIT: see Lord Diplock's *dicta* in *Chua Lip Kong v. Director-General Of Inland Revenue* [1981] 1 LNS 157; [1982] 1 MLJ 235, PC, an appeal to the Privy Council from Malaysia.

[12] The Federal Court in *UHG v. Director General Of Inland Revenue* [1974] 1 LNS 181; [1974] 2 MLJ 33, FC, held that the SCIT could not be erroneous in point of law unless (i) it appeared they acted without any evidence; or (ii) formed a view of the facts which could not be reasonably entertained; or (iii) the primary facts did not justify the inferences drawn or the conclusions arrived at. Raja Azlan Shah FJ (as HRH then was) held at p. 36(f) that it may be possible that the findings of facts of the SCIT may be erroneous in point of law, "in a very clear and compelling case whether either they have arrived at their conclusions without evidence or have misdirected themselves in point of law: see *Cooper v. Stubbs* [1925] 10 TC 29."

[13] In this instant appeal, the facts in the case stated by the SCIT consist of agreed facts and proved facts. The agreed facts were submitted by the parties in a statement of agreed facts to the SCIT during the hearing. These agreed facts are reproduced in para. 7.1 of the case stated.

[14] In addition to the statement of agreed facts, at the hearing before the SCIT, oral evidence was given by two witnesses for the taxpayer (AW1 and AW2) and one witness for the DGIR (RW1). The proven facts were facts found by the SCIT during the hearing before them. The proven facts are stated in para. 7.2 of the case stated.

[15] Both the agreed facts and the proved facts in the case stated are reproduced below:

7.1 Agreed Facts

(i) The appellant was incorporated on 2 April 1993. The appellant was principally engaged in property development.

(ii) The appellant purchased a plot of land in Petaling Jaya with a view of developing commercial properties on the land. For this purpose, The appellant had incurred development expenditure, amounting to RM7,630,092.00 as at 30 June 1999. The expenditure consisted of consultancy fees and preliminary site preparation expenses.

(iii) On 2 February 1999, the appellant executed an agreement entitled "joint venture agreement" with Luxor Properties Sdn Bhd ("Luxor Properties").

(iv) On 27 January 2006, the appellant's tax agent informed the Respondent that the entire consideration should have been recognised as income basis year 1999 and the agent submitted revised tax computations.

(v) On 23.3.2010, the Respondent rejected the appellant's revised tax computations.

(vi) On 23 March 2010, the Respondent also raised the notice of assessment with penalty for the year of assessment 2001.

(vii) On 6 April 2010, the appellant filed a notice of appeal against the Respondent's notice of assessment.

(viii) On 6 June 2010, the Respondent forwarded the said notice of appeal to the Special Commissioners.

7.2 Proved Facts

(i) Under the joint venture agreement dated 2 February 1999 between the taxpayer and Luxor Properties ("JVA"), the amount of consideration from Luxor Properties to the taxpayer is not expressed as a fixed figure.

(ii) Contrary to what was contended by the appellant, the amount of RM28,343,220.00 was not stated specifically as a consideration for the land which the appellant had sold to the Luxor Properties in the JVA.

(iii) In Exhibit E3, at Schedule 1A of the appellant's Computation of Estimated Profit for YA 2003 (Revised), the consideration or "Estimated Contract Sum" was shown as RM28,410,000.00. The appellant showed the same amount as the "Estimated Contract Sum" for its Computation of Estimated Profit for YA 2004 (Revised) in Schedule 1A. This amount was not stated as the consideration in the JVA.

(iv) Clause 8 of the JVA at page 114, Exhibit C1 states the percentage of entitlement that the appellant is entitled to and no specific figure of consideration is provided in the JVA as the total development cost for the land had not been ascertained on 2.2.1999.

(v) The appellant also gave a power of attorney to Luxor Properties to carry out development of the land and to obtain bridging loan as well as to do all necessary matters in relation to the development and sale of properties erected on the land. The title in the land was never transferred to Luxor Properties and the appellant is tasked with the responsibility of effecting the transfers of title to future end purchasers.

(vi) The appellant had always been submitting its accounts and income tax return based on the percentage of completion basis and this had been accepted by the Respondent. The appellant never declared or reported any income from the alleged outright sale *via* the JVA in its annual accounts ended 30.6.1999, 2000, 2001, 2002, 2003, 2004 or 2005 for its tax computation prior to 27.1.2006.

(vii) In 2005, the appellant's tax agent reviewed the appellant's tax files and was of the view that the income derived by the appellant from the JVA should be declared as income that had been accrued in the basis year 1999 and that the JVA should be deemed to be an outright sale of the appellant's land and not be treated as a joint venture between the appellant and Luxor Properties despite the express provisions in the JVA.

(viii) On 27.1.2006, the appellant's tax agent informed the DGIR that the sums it had received from Luxor Properties should be recognised as income in the basis year 1999 and submitted revised tax computations to that effect.

(ix) The appellant's tax agent is of the view that as the consideration for the JVA is deemed to be the taxpayer's income for the basis year 1999, no tax is to be paid by the appellant to the Respondent as all income derived and accruing in the basis year 1999 is exempt from income tax since that is what is commonly known as the "waiver year" whereby no tax was imposed on all income derived or accrued for the basis year 1999 when the Malaysian taxation system was changed from the preceding basis year to the current year basis with effect from 1 January 2000.

(x) On 23.3.2010, the Respondent accepted the appellant's contention that the JVA was an outright sale and purchase of the land and raised an assessment for the Year of Assessment 2001 ("YA 2001") with penalty.

(xi) The reason given by the Respondent for raising the assessment for YA 2001 is that the condition precedents to the JVA as provided in Clause 6 of the JVA, as shown on page 112 of Exhibit C1, were satisfied in 2001.

(xii) The last condition precedent to be satisfied was the approval of the development plan on 28.5.2001. Therefore, the JVA became unconditional on 28.5.2001 and the income is deemed to have been derived or accrued in YA 2001.

(xiii) As a result of the appellant's letter dated 27.1.2006, the Respondent raised a notice of assessment for YA 2001 and imposed a penalty on the taxpayer for its neglect in not reporting the disposal of land within the statutory period of 6 years which is computed as commencing from 1999 and ending in 2005.

Notes Of Evidence Of The SCIT Hearing

[16] The taxpayer had filed an application in encl. 2 for an order requiring the SCIT to find further facts and to state a supplementary case to the High Court.

[17] In its decision of 4 January 2016, this court refused the taxpayer's application in encl. 2. However, the learned Judicial Commissioner ("JC") exercised this court's discretion under para. 39(c) of Schedule 5 of ITA to order the production of the notes of evidence of the hearing before the SCIT. He held that the notes of evidence produced "may be considered by this court in deciding this appeal."

[18] The learned JC in para. 24 of his judgment emphasised that the order to produce the notes of evidence in this appeal "is wholly exceptional and is *sui generis*" *ie*, it is unique and different. His reason for ordering the production of the notes of evidence is because there exists certain evidence adduced by the taxpayer at the hearing which was unchallenged by the DGIR.

[19] The learned JC stated in para. 21 of his judgment that this court can intervene in the SCIT's findings of facts or inferences drawn from the SCIT's findings of facts.

[20] It is trite law that the findings of primary facts by the SCIT are unassailable. Inferences of pure fact by the SCIT are similarly unassailable. It is only inferences made by SCIT which involve assumptions as to the legal effect or consequences of primary facts, which can be overturned or set aside by the High Court, if they are found to be erroneous, since such inferences involve a question of law. This principle was explained by Lord Diplock in the unanimous judgment of the Privy Council in *Chua Lip Kong v. Director-General Of Inland Revenue* (*supra*), where His Lordship held:

> From the primary facts admitted or proved the Commissioners are entitled to draw inferences; such inferences may themselves be inferences of pure fact, in which case they are as unassailable as the Commissioners' finding of a primary fact; but they may be, or may involve (and very often do), assumptions as to the legal effect or consequences of primary facts, and these are always questions of law upon which it is the function of

A the High Court on consideration of a Case Stated to correct the SCIT if they can be shown to have proceeded upon some erroneous assumption as to the relevant law.

[21] As regards the evidence presented before the SCIT, Raja Azlan Shah FJ (as HRH then was) held in *UHG v. Director General Of Inland Revenue* (*supra*) B at p. 33:

> It is well established that where the appeal is by way of a Case Stated a statutory duty is laid upon the SCIT to set forth the facts as found by them and the deciding order but not the evidence on which the findings are based. *The court of appeal is not concerned with the evidence given in the Case* C *Stated but with the facts therein stated and it is points of law upon those facts the court has to decide. The question for the court of appeal therefore is whether, given the facts as stated, the SCIT were justified in law in reaching the conclusions they did reach*.
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> (emphasis added)

D **[22]** Lord Diplock in *Chua Lip Kong v. Director-General Of Inland Revenue* (*supra*) held at pp. 236(f):

> The summaries should be restricted to the parties' contentions of law; they should not include ... arguments of the parties directed solely to the reliability of the evidence heard by the Commissioners and inferences of E pure fact that ought to be drawn from it.

[23] In *NTS Arumugam Pillai v. Director-General Of Inland Revenue* [1976] 1 LNS 78; [1977] 1 MLJ 67, the High Court held that the case stated does not include the notes of evidence of the hearing before the SCIT. Chang Min Tat J (as he then was) said:

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> 10. Application for the notes of evidence
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> An application for a part of the notes of evidence taken by the Special Commissioners was made before the hearing of the case stated to my brother Arulanandom J ... On further consideration, Arulanandom J. dismissed the application. I am advised that an appeal has been lodged G from his decision to the Federal Court. Before me, this application is repeated and I am asked to adjourn the hearing until the notes are supplied ... But **it is quite clear that the statement of a case does not ordinarily include the evidence, and certainly not the notes of evidence recorded *verbatim***. By definition, it states the facts as found by the trial officers. Paragraph 37 of Schedule 5 to the Income Tax Act, 1967 provides H that:
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> A case stated under paragraph 34:
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> (a) shall set forth the facts as found by the Special Commissioners, the deciding order and the grounds of their decisions; and
>
> I (b) shall be signed by the Special Commissioners who heard the appeal.
>
> **There is therefore no justification for the inclusion of the notes of the oral evidence taken before the Special Commissioners**.
>
> (emphasis added)

[24] The High Court's decision was upheld by the Federal Court in *NTS Arumugam Pillai v. Director-General Of Inland Revenue* [1977] 1 LNS 77; [1977] 2 MLJ 63. A

[25] Therefore, with respect to the learned JC, the fact there exists the evidence that was undisputed by the DGIR at the hearing before the SCIT, should not be a reason for this court to order the production of the notes of evidence, which the learned JC says this court "may consider in deciding this appeal". Additionally, the fact that the DGIR is entitled to "dispute the NOE and to present any submission as the DGIR sees fit so as to resist successfully" should also not be the basis for this court to order the production of the notes of evidence. B C

[26] Unlike appeals to the High Court from the decision or judgment of a subordinate court, which are appeals on both facts and law, an appeal by way of case stated from a deciding order of the SCIT is on questions of law only. This is expressly stated in the statutory provision on which the right of appeal is based *ie*, para. 34 of Schedule 5 of ITA. This is an overarching legal principle for appeals by way of case stated that has been adopted by the Federal Court in *UHG v. Director General Of Inland Revenue* (*supra*). D

[27] The function of the High Court in an appeal by way of case stated against the decision of the SCIT is to determine whether or not the SCIT was erroneous on points of law: *ie*, had the SCIT misdirected themselves on a point of law; did the primary facts justify the inferences they drew or the conclusions they arrived at; did they make an erroneous assumption as to the relevant law as to the legal effect or consequences of a particular primary fact underlaying their inferences. E F

[28] The learned JC held that his decision to order the production of the notes of evidence is not appealable. This is based on s. 102(4) read together paras. 23, 34 and 41 of Schedule 5 of ITA. Paragraph 41 of Schedule 5 states as follows:

> 41. There shall be such rights of appeal from decisions of the High Court on an appeal under paragraph 34 as exist in respect of decisions of the High Court on questions of law in its appellate civil jurisdiction. G

[29] The general right of appeal to the Court of Appeal from any order or judgment of the High Court in s. 67(1) of the Courts of Judicature Act 1964 is subject to any other written law. Section 67(1) states: H

> 67. (1) The Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of any High Court in any civil cause or matter, whether made in the exercise of its original or of its appellate jurisdiction, subject nevertheless to this or any other written law regulating the terms and conditions upon which such appeals shall be brought. I

[30] The learned JC held that the right of appeal in para. 41 of Schedule 5 of ITA is specific statutory provision, whereas s. 67(1) of the Courts of Judicature Act 1964 is a general statutory provision. Therefore, pursuant to the maxim *generalia specialibus non derogant*, the specific statutory in para. 41 of Schedule 5 overrides the general statutory provision in s. 67(1): see *PP v. Chew Siew Luan* [1982] CLJ 354; [1982] CLJ (Rep) 285; [1982] 2 MLJ 119. The learned JC held that in accordance with this rule of statutory construction, para. 41 of Schedule 5 of ITA prevails over s. 67(1) of the Courts of Judicature Act 1964. His Lordship held in para. 31 of his judgment:

> 31. If the above interpretation of Paragraph 41 [of Schedule 5 of ITA] is accepted, the Order to Produce NOE does not concern any decision by the High Court on questions of law referred to the High Court in the Case Stated. Accordingly, by reason of Paragraph 41, there cannot be any appeal to the Court of Appeal against the Order to Produce NOE.

[31] Nevertheless, the DGIR appealed against the decision of the High Court. The Court of Appeal accepted the learned JC's decision that High Court's order to produce the notes of evidence is not appealable and for this reason allowed the taxpayer's preliminary objection to the DGIR's appeal against decision. It did not hear the appeal on its merits and dismissed the DGIR's appeal on 21 March 2018. In its judgment, the Court of Appeal held:

> MAKA ADALAH DENGAN INI DIPERINTAHKAN DENGAN SEBULAT SUARA bahawa:
>
> (a) Bantahan awal [preliminary objection] oleh Responden bahawa keputusan Mahkamah Tinggi bertarikh 04 Januari 2018 tidak boleh dirayu adalah dibenarkan;
>
> (b) Rayuan Perayu ditolak berdasarkan atas bantahan awal sahaja; dan
>
> (c) Kos sebanyak RM5,000 kepada Responden.

[32] The DGIR's application for leave to appeal against the decision of the Court of Appeal was dismissed by the Federal Court on 13 July 2018.

[33] Notwithstanding the fact that the notes of evidence of the appeal before the SCIT were produced before this court pursuant to the order dated 4 January 2016, and the learned JC said that the said notes of evidence "may be considered" by this court in deciding this appeal, it is settled law that in an appeal by way of case stated from the SCIT, the High Court can only consider (i) the facts as set out in the case stated – both primary and inferred; and (ii) the SCIT's application of the law, in (a) their inferences made from the primary facts; (b) their assumptions as to the legal effect or consequences of primary facts; (c) their conclusions; and (d) their decision.

[34] I agree with the submission of the learned Senior Revenue Counsel ("SRC") that by considering the notes of evidence, this court will be taking on the role of a trial judge and not that of an appellate court in an appeal by way of case stated.

[35] Accordingly, in determining the taxpayer's appeal against the deciding order of the SCIT, I have not referred to the notes of evidence that were produced pursuant to this court's order dated 4 January 2016.

This Appeal

[36] The question of law for this court's opinion in the case stated by the SCIT is "whether on the facts as stated by us, our decision is correct in law."

[37] The taxpayer for basis periods of 2004 to 2009 in its audited accounts and tax returns filed with the DGIR had reported that it did not receive any income for those years save for the sum of RM7,000 in 2001, which was explained as a gain from the sale of a motor vehicle. The taxpayer had reported that the agreement was a joint venture agreement between it and Luxor Properties and that the income under the agreement was on a percentage completion basis.

[38] However, in a letter dated 27 January 2006, the taxpayer's tax agent informed the DGIR that the income under the agreement should have been recognised as income for the basis period of 1999. The taxpayer's tax agent had also submitted on the same date revised tax returns and tax computations for YA 2003 and YA 2004.

[39] The issues for the SCIT's determination in the said appeal are reproduced below (the taxpayer was referred to as "the appellant" and the DGIR was referred to as "the respondent"):

1st Issue: Burden of Proof

Whether the appellant had committed fraud, wilful default or has been negligent in not recognising the income under the agreement titled "Joint Venture agreement" dated 2.2.1999 in the year of assessment 2001 for the purpose of s. 91(3) of the Income Tax Act 1967?

If the Respondent fails to discharge the burden of proof, then the notice of assessment is null and void.

2nd Issue: Accrual of Income

If the answer to question 1 above is in the affirmative, then Issue 2 has to be decided, that is:

> Pursuant to Section 24(1)(a) of the Income Tax Act 1967, whether the debt owing to the appellant under the agreement titled "Joint Venture agreement" dated 2.2.1999 between the appellant and Luxor Properties Sdn Bhd is to be treated as the gross income of the appellant in the basis period 1999 or basis period 2001?

3rd Issue: Penalty

Notwithstanding Issue 2, whether the Respondent was correct in law to impose penalty under s. 113(2) of the Income Tax Act 1967?

The Taxpayer's Case

[40] The taxpayer's case is that the SCIT was wrong in concluding that the income derived by the taxpayer under the agreement should be recognised in the basis period of 2001 and not in the basis period of 1999.

[41] Learned counsel for the taxpayer, Datuk DP Naban, submits that the questions of law for this court's determination are:

(i) Outright sale in 1999 or 2001?

Whether the SCIT had erred in law in failing to conclude that the agreement was an outright sale entered in 1999 and consequently failed to recognise that the consideration derived from the agreement constitutes the appellant's income in the basis year 1999 in the form of debt owing pursuant to s. 24(1)(a) of ITA?

(ii) Notice of assessment with penalty

(a) Whether the SCIT had erred in law in upholding the DGIR's decision of issuing the notice of assessment with penalty for the year of assessment 2001 despite it being issued in 2010, where the DGIR needs to prove that the taxpayer had acted negligently, or had committed wilful default or fraud in filing its income tax returns for the year of assessment 2001?

(b) Whether the SCIT acted erroneously in dismissing the taxpayer's appeal though it construed the agreement as a joint venture between the taxpayer and Luxor to develop the land, as the notice of assessment of penalty was raised on the premise that the agreement was an outright sale subject to the satisfaction of the "conditions precedent" in the year of assessment 2001?

(iii) Penalty

Whether the SCIT was erroneous in upholding the DGIR's decision to impose penalty under s. 113(2) of ITA?

[42] The taxpayer's case is that from 1999 until 2005, it had filed its tax returns on the premise that the income was being recognised on a percentage of completion basis. However, on obtaining tax advice for a new partner who joined in its tax agents in 2005, the taxpayer took the view that the agreement was an outright sale and the income should be recognised in 1999. And as 1999 is a tax waiver year, no tax should be charged on the income received under the agreement.

[43] On question of law (i), the taxpayer contends that the SCIT was wrong in failing to conclude that the income derived under the agreement should be recognised in 1999. Learned counsel for the taxpayer submits that the agreement is an outright sale entered in 1999 and does not contain the conditions precedent concluded by the SCIT. He argues that there is no basis for the SCIT to conclude that the agreement is a joint venture between the appellant and Luxor Properties. He submits that although cl. 6.1 of the

agreement is labelled as "conditions precedent", in actual fact and for all intents and purposes, the conditions in cl. 6.1 are only promissory conditions.

[44] On question of law (ii)(a), the taxpayer submits that the DGIR has no legal or factual basis to raise the notice of assessment for YA 2001 in 2010. Pursuant to s. 91(3) of ITA, the DGIR is entitled to raise a time-barred assessment if it appears to him that the taxpayer had committed wilful default, fraud or acted negligently in filing its income tax returns. The taxpayer contends that the DGIR has failed to prove that the appellant was either negligent or had committed wilful default or fraud so as to enable it to raise a time-barred assessment.

[45] On question of law (ii)(b) posed by the taxpayer, Datuk Naban submits that the SCIT were clearly wrong in failing to conclude that the agreement was an outright sale subject to the satisfaction of the "conditions precedent" in YA 2001. The taxpayer contends that the SCIT's finding that the agreement was a joint venture agreement is without any legal or factual basis.

[46] On question of law (iii), the taxpayer submits that the SCIT had erroneously dismissed the taxpayer's appeal against the DGIR's imposition of a penalty. Datuk Naban argues that the SCIT failed to appreciate the proven fact that in exercising its discretion to impose a penalty under s. 113(2) of ITA, the DGIR had acted mechanically without applying its mind to the facts and circumstances of the case. He submits that the SCIT had failed to realise that s. 113(2) of ITA is not a mandatory provision as it clearly confers discretion on the DGIR as to whether penalty should be imposed or not.

The DGIR's Case

[47] The DGIR's case is that the decision of the SCIT on the facts as stated is correct in law.

[48] The learned SRC, Puan Ashrina binti Ramzan Ali, submits that the taxpayer had clearly neglected to report the disposal of the land within the statutory period of six years, which is computed as commencing from 1999 and ending in 2005. She argues the fact that the taxpayer had requested for the DGIR to recognise the income from the agreement in 1999 instead of 2001, clearly shows the negligence and also wilful default on the part of the taxpayer. She submits that throughout the whole six-year period, the taxpayer had never informed the DGIR that the agreement was a sale and purchase agreement, and it never declared or reported any income from the outright sale of the land during that six-year period.

[49] It is the DGIR's contention that the taxpayer had never declared the transaction between the taxpayer and Luxor Properties as an outright sale in 1999, nor did it declare the sale price of RM28,343,220 in 2001 when the

conditions precedent to the agreement were fulfilled. Thus, since 1999, the taxpayer had neglected to inform the DGIR that it had sold its land to Luxor Properties and that it seeks to have all the proceeds from the agreement recognised on an accrual basis for YA 1999. It was only on 27 January 2006, after a lapse just short of seven years from the date of the agreement did the taxpayer informed the DGIR that there had been an outright sale in 1999. For these reasons, learned SRC argues that the assessment is lawful and valid.

[50] Puan Ashrina submits that the taxpayer had neglected to inform the DGIR of the sale of the land and had committed wilful default in not reporting the outright sale as claimed by them to be in 1999 but had instead reported the transaction as a joint venture agreement in its audited accounts for years 1999 to 2005.

[51] As regards the imposition of the penalty, the learned SRC submits that the DGIR was correct to impose the penalty after taking in account the incorrect returns submitted by the taxpayer. She further submits that a taxpayer is not entitled to claim "good faith" as a defence under sub-s. 113(2) of ITA since the law is settled that the good faith defence is only available under sub-s. 113(1) and not sub-s. 113(2).

Changes To The Malaysian Tax Regime w.e.f. 1 January 2000

[52] The issue at the heart of this appeal is whether the agreement (i) is an outright sale of the land that took place in 1999, or (ii) a conditional contract that became unconditional in 2001.

[53] If the agreement is an outright sale of the land that took place in 1999, the debt owed by Luxor Properties to the taxpayer for the land would be treated, pursuant to s. 24(1)(a) of the ITA, as the taxpayer's gross income received in the basis period of 1999. But if the agreement is a conditional contract, which became unconditional in 2001, the income received would be recognised in the basis period of 2001.

[54] To understand why the question of whether the income received by the taxpayer under the agreement should be treated as gross income in the basis period of 1999 or 2001 is so important to this appeal, it is necessary to look at the changes that took place to Malaysia's tax regime with effect from 1 January 2000.

(i) the first change was the move from "preceding year basis of assessment" to "current year basis of assessment"; and

(ii) the second change that was the introduction of the new self-assessment tax regime.

[55] To affect these changes, amendments were made to the ITA by the Income Tax (Amendment) Act 1999 (Act A1055) (the "1999 Amendment Act") and Income Tax (Amendment) (No. 2) Act 1999 (the "1999 Amendment Act (No. 2)").

First Change: Move From "Preceding Year Basis Of Assessment" To "Current Year Basis Of Assessment"

[56] To enable the transition from the preceding year basis assessment to the current year basis assessment, pursuant to s. 8 of the 1999 Amendment Act, tax on the income earned for the year of assessment 2000 (except for dividends and income subject to final withholding tax) was waived. Section 8 of the 1999 Amendment Act provides:

> **8. Waiver of Tax**
>
> Tax on the income of any person for the year of assessment 2000 shall be waived except for the tax on the following:
>
> (a) income from an employment received by a non-citizen or a non-resident individual who commences or ceases that employment in the year 1999;
>
> (b) dividends, notwithstanding that the dividends are treated as business income; and
>
> (c) income which is subject to withholding tax under ss. 109, 109B or 109C of the principal Act.

[57] Under s. 17 of the 1999 Amendment Act, there are two years of assessment for year 2000: (i) YA 2000 (preceding year basis) in respect of income earned in the basis period ending in 1999; and (ii) YA 2000 (current year basis) in respect of income earned in the basis period ending in 2000.

[58] There is no tax payable for income earned in the basis period of 1999. Hence, if the debt owing by Luxor Properties to the taxpayer under the agreement is treated as the taxpayer's gross income in 1999, the taxpayer would not have to pay any tax for the sum of RM28,343,220 it had received from Luxor Properties under the agreement.

[59] However, if the agreement is a conditional agreement that was completed in 2001, the debt owing by Luxor Properties to the taxpayer for land, would be treated as income earned in YA 2001. As 2001 is not a tax waiver year, the taxpayer would have to pay tax for the income received in that basis period.

Second Change: Move To Self-assessment Of Tax

[60] Under this new self-assessment regime, beginning with YA 2001, a taxpayer is required to make a self-assessment in its tax returns furnished to the DGIR for each year of assessment. The DGIR is deemed to have made an assessment of the amount of tax on chargeable on the income, based on the amounts of tax and the chargeable income specified by the taxpayer in its tax return.

[61] To affect this new requirement for self-assessment, the ITA was amended by the 1999 Amendment Act (No. 2). The 1999 Amendment Act (No. 2) introduced a new s. 107C of ITA, which required every company

to furnish to the DGIR an estimate of tax payable for each year of assessment, beginning from YA 2001, not later than 30 days before the beginning of the basis period for that year of assessment.

[62] Additionally, under a new s. 77(1A), for each year of assessment beginning YA 2001, companies must furnish to the DGIR, a tax return in the prescribed form within six months from the date following the close of the accounting period. For the tax return to be filed under s. 77(1A) each year of assessment, s. 77(1C) states that the return for a year of assessment must specify the chargeable income and the amount of income tax payable (if any) on that chargeable income for that year

[63] In line with the move to the new self-assessment regime, the new s. 90(1A) of ITA introduced by the 1999 Amendment Act (No. 2) expressly states that where a company has furnished a return to the DGIR under s. 77(1A), the DGIR shall be deemed to have made, on the day on which the return is furnished, an assessment of the amount of tax on the chargeable income as shown on the return form submitted by the said company. And the new s. 90(1B) of ITA stipulates that (a) a tax return shall be deemed to be a notice of assessment, and (b) the deemed notice of assessment shall be deemed to have been served on the company on the day which the DGIR is deemed to have made the assessment.

[64] Section 77 of ITA was amended by the Income Tax (Amendment) Act 2002 (Act A1151) ("2002 Amendment Act"), whereby the provisions in ss. 77(1A) and 77(1C) were incorporated in an amended s. 77A of ITA. And the provisions in ss. 90(1A) and 90(1B) were incorporated in an amended s. 90 of ITA.

[65] At the time of the taxpayer's filing of the revised tax returns on 27 January 2006 and the issuance of the notice of assessment by the DGIR in 2010, ss. 77A and 90 of ITA as amended by the 2002 Amendment Act were in effect. Hence, pursuant to the new self-assessment provisions introduced by the 1999 Amendment Act (No. 2), the taxpayer should have filed a tax return declaring the consideration for the land as income earned in 2001, within six months from the close of its accounting period for YA 2001.

Analysis

Is The Agreement An Outright Sale Of The Land By The Taxpayer To Luxor Properties, Or Is The Agreement A Conditional Contract?

[66] Having explained the changes to Malaysia's tax regime and the ITA in respect of the basis period 1999 and 2001, this court will now consider whether or not the SCIT was wrong at law in concluding that the agreement was a conditional contract, which had conditions precedent that were satisfied in 2001.

[67] The SCIT found that the agreement was a joint venture agreement subject to the condition precedents in cl. 6.1 of the agreement, which final condition was satisfied in 2021. Based on this finding of fact, the SCIT concluded the DGIR was correct in issuing the assessment for the income received under the agreement for YA 2001.

[68] The taxpayer disagrees with the SCIT's finding of fact that the agreement is a joint venture agreement and that it is a conditional agreement. The taxpayer's case is that the conditions precedent in cl. 6.1 of the agreement are promissory conditions that go to the performance of the contract, but which have no effect to the formation of the contract.

Construction Of A Contract Is A Question Of Law

[69] It is settled law that the construction of a contract is a question of law and not of fact: see *Silver Concept Sdn Bhd v. Brisdale Rasa Development Sdn Bhd* [2005] 3 CLJ 259; [2005] 4 MLJ 101, CA.

[70] The Federal Court in *Far East Holdings Bhd & Anor v. Majlis Ugama Islam Dan Adat Resam Melayu Pahang & Other Appeals* [2018] 1 CLJ 693; [2018] 1 MLJ 1 reiterated that the construction of contract is a question of law. It held:

> [156] *It must be more than settled that the construction of a document is a question of law*. In *Munusamy v. Public Services Commission* [1964] 1 LNS 118; [1964] 1 MLJ 239, where on the construction of an article of the Constitution which forbids the dismissal or reduction in rank of certain persons unless a certain condition is complied with, that is that the person concerned be given a reasonable opportunity of being heard, *Thomson LJ said "That question of construction is a question of law …*". In *Citicorp Investment Bank (Singapore) Ltd v. Wee Ah Kee* [1997] 2 SLR 759, *Yong Pung How CJ said "we must approach the construction of the document, which is a question of law, untrammelled by any concession as to the meaning of the agreement that might have been given by the court below*". "It is trite that a question of construction is a question of law and not fact (see *Bahamas International Trust Co Ltd & Anor v. Threadgold* [1974] 1 WLR 1514 (HL)" (*Bintulu Development Authority v. Pilecon Engineering Bhd* [2007] 2 CLJ 422; [2007] 2 MLJ 610 per Nik Hashim JCA, as he then was, delivering the judgment of the court). *In Bahamas International Trust Co Ltd v. Threadgold*, Lord Diplock said "*that the construction of a written document is a question of law*", which was followed in *Tan Suan Heoh v. Lim Teck Ming & Ors* [1985] 1 LNS 12; [1987] 2 MLJ 466, *NVJ Menon v. The Great Eastern Life Assurance Company Ltd* [2004] 3 CLJ 96; [2004] 3 MLJ 38, *Silver Concept Sdn Bhd v. Brisdale Rasa Development Sdn Bhd* [2005] 3 CLJ 259; [2005] 4 MLJ 101, *Padiberas Nasional Bhd v. Kontena Nasional Bhd* [2009] 1 LNS 1453; [2010] 3 MLJ 134, and *The Government of India v. Cairn Energy India Pty Ltd & Anor* [2012] 3 CLJ 423; [2011] 6 MLJ 441 and *Tun Dr Mahathir Mohamad & Ors v. Datuk Seri Mohd Najib Tun Hj*

A *Abdul Razak (No 2)* [2017] 8 CLJ 350; [2017] 9 MLJ 1). In *Desa Teck Guan Koko Sdn Bhd v. Syarikat Hap Foh Hing* [1994] 3 CLJ 172; [1994] 2 MLJ 246, Ian Chin J opined that "… a question of construction is (generally speaking) a question of law" ...

(emphasis added)

B **[71]** Accordingly, it is for this court to decide based on the construction of the agreement whether the agreement is a contract for the outright sale of the land from the taxpayer to Luxor, or is the agreement a joint venture agreement between the taxpayer and Luxor Properties for the development of the land.

C **[72]** This court must also decide whether the agreement is a conditional contract subject to conditions precedent, and whether the condition precedents in cl. 6.1.1 of the agreement are made up of contingent conditions, promissory conditions or both contingent conditions and promissory conditions.

D Legal Principles Governing Construction Of Contracts

[73] The established legal principles governing the construction of contracts are as follows:

E (i) a contract must be construed as a whole, in order to ascertain the true meaning of its clauses;

(ii) a clause should not be construed in isolation: as far practicable effect must be given to every clause;

(iii) each clause must be brought into harmony with the other clauses in a
F contract;

(iv) the intention of the parties is to be construed from the words used in the contract and their meaning; and

(v) words in a contract should be construed in their grammatical and
G ordinary meaning, except to the extent that some modification is necessary in order to avoid absurdity, inconsistency or repugnancy.

[74] These legal principles have been used time and again by our courts in the construction of contracts. The Federal Court in *Lucy Wong Nyuk King & Anor v. Hwang Mee Hiong* [2016] 4 CLJ 813; [2016] 3 MLJ 689
H ("*Lucy Wong*"), per Azahar Mohamed FCJ (as he then was) held:

[34] *… it is an established principle of construing a contract that, among others, a contract must be construed as a whole, in order to ascertain the true meaning of its several clauses, and also, so far as practicable, to give effect to every part of it. Each clause in an ordinary commercial contract should be so interpreted as to bring them*
I *into harmony with the other clauses of the contract*. (see *National Coal Board v. Wm Neill & Son (St Helens) Ltd* [1984] 1 All ER 555 which was cited in *Royal Selangor Golf Club v. Anglo-Oriental (M) Sdn Bhd* [1990] 1 CLJ 995; [1990] 3 CLJ (Rep) 37 and *Mulpha Pacific Sdn Bhd v. Paramount Corporation*

Bhd [2003] 4 CLJ 294; [2003] 4 MLJ 357). In *Australian Broadcasting Commission v. Australasian Performing Right Association Limited* [1973] 129 CLR 99, it was held that the whole of the contract has to be considered, since the meaning of any one part of it may be revealed by other parts, and the words of every clause must if possible be construed so as to render them all harmonious one with another.

[35] Professor McMeel in *The Construction of Contracts, Interpretation, Implication and Rectification*, (2nd edn, 2011) explains in clear words this long-standing canon of construction at para 1.73 as follows:

> Both the traditional and the modern approaches to construction stress the importance of having regard to the instrument as a whole. It is important not to fixate on one particular word or phrase and thereby neglect the overall purpose of the document or to give disproportionate importance to one phrase or clause. This is a long-standing rule.

[36] As stated by Lewison in *The Interpretation of Contracts* 5th edn at para 7.02 that *in order to arrive at the true interpretation of a document, a clause must not be considered in isolation, but must be considered in the context of the whole of the document.* In *Chamber Colliery Company Ltd v. Twyerould* (1893) [1915] 1 Ch 268 (note) (which was cited by Lewison), Lord Watson said:

> I find nothing in this case to oust the application of the well-known rule that a deed ought to be read as a whole, in order to ascertain the true meaning of its several clauses; and that the words of each clause should be so interpreted as to bring them into harmony with the other provisions of the deed, if that interpretation does no violence to the meaning of which they are naturally susceptible.
>
> (emphasis added)

[75] The Federal Court in *Morello Sdn Bhd v. Jaques (International) Sdn Bhd* [1995] 2 CLJ 23; [1995] 1 MLJ 577, held that the intention of the parties is to be construed from the words used in the contract and their meaning. Edgar Joseph Jr FCJ at p. 31 (CLJ); pp. 589 to 590 (MLJ) said:

> **For the purposes of construction of contracts, the intention of the parties is the meaning of the words they have used**. In *Schuler (L) AG v. Wickman Machine Tool Sales Ltd* [1974] AC 235; [1973] 2 All ER 39; [1973] 2 WLR 683, Lord Simon of Glaisdale approved the following passage in *Norton on Deeds* (2nd edn) at p 50:
>
> > ... the question to be answered always is, 'What is the meaning of what the parties have said?' not 'What did the parties mean to say?'... it being a presumption *juris et de jure* ... that the parties intended to say that which they have said.
> >
> > (emphasis added)

At pp. 47 to 48 (CLJ); p. 609 (MLJ) of the Federal Court's judgment, His Lordship held:

> In construing the word 'deposit' in cl. 3 of the sale and purchase agreement, it is essential that the basic principle of construction as laid down by Parke LJ in *Ford v. Beech* (1848) 11 QB 852 at p. 866, be borne in mind:
>
> > ... the common and universal principle ought to be applied: namely that it ought to receive that construction which its language will admit, and which will best effectuate the intention of the parties, to be collected from the whole of the agreement, and that greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent.
>
> This principle has been consistently followed in our courts (see *Jagatheesan*'s case [1969] 2 MLJ 253 at p. 256, FC; *Karuppiah v. Petaling Garden Co Sdn Bhd* [1972] 1 MLJ 11 at p. 12 which was upheld in [1972] 1 MLJ 173, FC).

[76] The Court of Appeal in *Malaysian Newsprint Industries Sdn Bhd v. Perdana Cigna Insurance Bhd & Ors* [2008] 1 CLJ 246; [2008] 2 MLJ 256, CA, at para. 26 per Suriyadi Halim Omar JCA (as then was) held that when interpreting a contract the words in the contract should also be construed in their grammatical and ordinary meaning, except to the extent that some modification is necessary in order to avoid absurdity, inconsistency or repugnancy.

Law On Contingent/Conditional Contracts

[77] Contingent or conditional contracts are governed by ss. 32 to 37 of the Contracts Act 1950 (Act 136) ("Contracts Act"). A "contingent contract" is defined in s. 32 of the Contracts Act as "a contract to do or not to do something, if some event, collateral to the contract, does or does not happen." Section 33 of the Contracts Act states that:

> (a) Contingent contract to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.
>
> (b) If the event becomes impossible, such contracts become void.
>
> ILLUSTRATIONS
>
> (a) A makes a contract with B to buy B's horse if A survives C. This contract cannot be enforced by law unless and until C dies in A's lifetime.
>
> (b) A makes a contract with B to sell a horse to B at a specified price, if C, to whom the horse has been offered, refuses to buy him. The contract cannot be enforced by law unless and until C refuses to buy the horse.
>
> (c) A contracts to pay B a sum of money when B marries C. C dies without being married to B. The contract becomes void.

[78] The leading case on contingent or conditional contracts is the Federal Court case of *National Land Finance Co-operative Society Ltd v. Sharidal Sdn Bhd* [1983] 2 CLJ 76; [1983] CLJ (Rep) 282; [1983] 2 MLJ 211, FC ("*Sharidal*"). The Federal Court held that there are at least two ways the word "condition" is used: first, it is used as a condition as opposed to a warranty, and secondly, it is used in the sense of a contingent condition (precedent or subsequent) as opposed to a promissory condition. Salleh Abas CJ (Malaya) (as he then was) explained the difference between a contingent contract and a promissory condition as follows:

> *A contingent condition,* as we have already referred it*, is a provision in a contract to the effect that the contract shall not take effect unless and until the condition is fulfilled, and the non-fulfilment of the condition does not render either party liable in damages to the other; whilst a promissory condition, on the other hand, is an essential term of the contract, the breach of which entitles the innocent party to break itself as discharged from the contract and to sue for damages*.
>
> (emphasis added)

In that case, the parties had entered into a contract for sale of property, where the condition of the agreement was subject to the approval of the Foreign Investment Committee ("FIC"). The Federal Court found that the requirement for the FIC approval belongs to the category of contingent conditions since the non-fulfilment of the condition negates the existence of any contractual relationship between the parties to complete the agreement. Salleh Abas CJ (Malaya) held:

> It is therefore obvious that the parties have entered into a contract of sale contingent upon the approval of the transaction by the FIC over which the parties had no control. There was no promise, nor guarantee that such approval would be given. *Such a condition, in our judgment, is more than a mere essential stipulation of the contract, a breach of which entitles an innocent party to regard itself as discharged from further performance and to sue for damages. It is, however, a condition which is known in the law of contract as a contingent condition, the effect of which is that a contract shall not take effect unless and until the condition is fulfilled*. (See *Trans Trust SPRL v. Danubian Trading Co Ltd* [1952] 2 KB 297 304 – per Denning, LJ – and *Property and Bloodstock Ltd v. Emerton Bush v. Property and Bloodstock Ltd* [1967] 3 All ER 321 330 – per Sachs, L.J.). Until the FIC approval was given liability for further performance remained unenforceable, *ie*, suspended although neither the respondents nor the appellants could resile from it until it could be definitely ascertained that the condition could not be fulfilled. This is in effect laid down by s. 33(a) of the Contracts Act which enacts ...
>
> We draw much support from *Aberfoyle Plantations Ltd v. Khaw Bian Cheng* [1960] MLJ 47 ...
>
> (emphasis added)

[79] *Aberfoyle Plantations Ltd v. Khaw Bian Cheng* [1959] 1 LNS 3; [1960] 1 MLJ 47, PC ("*Aberfoyle Plantations*") is an appeal to the Privy Council from Malaysia. In that case, there was a condition in the sale agreement that the completion of the sale of the land was conditional upon the vendor obtaining the renewal of the lease from the State Government. The Privy Council held that the condition for the vendor to obtain the renewal of the lease was a contingent condition and not a promissory condition.

[80] The Federal Court in *Sharidal* said that they cannot see any difference between the condition to renew the lease of the land in *Aberfoyle Plantations* and the condition for an FIC approval in that case. Salleh Abas CJ (Malaya) said:

> We confess we cannot see any difference between this condition and the requirement for FIC approval in the case under the present appeal. To us the requirement belongs to the category of contingent conditions the non-fulfilment of which negates the existence of any contractual relationship between the parties to complete the agreement.

[81] The Court of Appeal in *Ideal City Development Sdn Bhd v. Dynamic Mould Sdn Bhd* [2003] 3 CLJ 201; [2003] 3 MLJ 152, CA applied the Federal Court's decision in *Sharidal*, where it held, per Richard Malanjum JCA (as he then was), that the requirement to obtain an FIC approval for the sale of property was a condition precedent and, therefore, a contingent condition in the agreement.

[82] In *Langkawi R & D Academy Sdn Bhd v. Ketua Setiausaha, Kementerian Pertahanan Malaysia & Ors* [2013] 3 CLJ 1006; [2012] 5 MLJ 662, [2012] 4 AMR 706, CA, the Court of Appeal, per Abdul Malik Ishak JCA, held:

> A contract is subject to a condition precedent when the contract is not binding unless or until a specified event occurs. Thus, where the condition is precedent, the agreement is not fully binding until the event occurs. The non-fulfilment of a condition precedent will result in the contract being discharged, either automatically or at the election of one of the parties.

[83] From the aforementioned cases, it can be concluded that the applicable legal principles for contingent contracts are:

(i) a contingent condition is a provision in a contract to the effect that the contract is not to take effect unless and until the condition is fulfilled, and the non-fulfilment of the conditions does not render either party liable in damage to another;

(ii) a promissory condition is an essential term of the contract, the breach of which entitles the innocent party to treat himself as discharged from the contract and to sue for damages;

(iii) a contingent or conditional contract is a contract that contains a contingent condition; and

(iv) if the contract is contingent or conditional, the rights of the parties are suspended until the conditions identified are satisfied and the agreement can then be completed. Unless and until the conditions have been fulfilled, the agreement simply does not take effect.

[84] In construing whether the agreement is an agreement for the outright sale of the land or whether it is a joint venture agreement and a conditional contract, it is necessary for this court to interpret and construe the whole agreement and all its terms and conditions.

[85] I find that from the grammatical and ordinary meaning of the words in the agreement, it can be construed that the taxpayer and Luxor Properties had agreed to enter into an unincorporated joint venture to allow Luxor Properties to develop commercial/retail space and affordable service apartments on the land upon the terms and conditions in the agreement. The provisions in the preamble of the agreement and in cl. 1.1 are in line with in cl. 9.3, where both the taxpayer and Luxor Properties agree to be parties to the sale and purchase agreements ("SPAs") with the purchasers of the units built in the project. Paragraph (iii) of the preamble, cl. 1.1 and cl. 9.3 of the agreement are reproduced below:

Preamble

(iii) *The landowner is desirous at entering into a joint-venture with the Developer to allow the Developer to develop commercial/retail space and affordable service apartments on the said land* (hereinafter called "the project" which expressions shall include the modification, variations and alterations proposed by the Developer and approved by the relevant authorities at any time from time to time) on the terms and conditions hereinafter appearing and the Developer has agreed to the same.

Clause 1: Agreement for Development

1.1 In consideration of and subject to the respective agreements, covenants, undertakings and obligations of the parties hereto, *the parties hereto agree to enter into an unincorporated joint venture to develop the project on the said land upon the terms and subject to the conditions contained in this agreement*.

...

9.3 *Both the Developer and the landowner shall be parties (as the Vendor and the proprietor, respectively) to the sale and purchase agreements with the purchasers* (hereinafter called "the Sale agreements") and any one of them shall hereinafter be called "the Sale agreement") which shall contain the following provisions in respect of the landowner:

9.3.1 *recitals that the landowner is the registered and beneficial owner of the said land, the landowner has granted the Developer the absolute right to develop the said land* and agrees to the sale of the said land or any part thereof for the purpose of the Sale agreement;

...

A 9.3.4 *upon issuance of the strata title to the said parcel, the landowner shall execute and deliver to the Developer a valid and registrable memorandum of transfer of the said parcel to the purchaser* specified in the Sale agreement, his heirs, nominee or lawful assign.

(emphasis added)

B **[86]** In my view, if the land had been sold to Luxor Properties pursuant to an outright sale under the agreement, Luxor Properties would at the very least be the beneficial owner of the land by the time the project is completed and ready for sale. However, as can be seen under cl. 9.3.1, the SPAs with the purchasers of the units will contain recitals that the taxpayer is the C registered and beneficial owner of the land and that the taxpayer had granted Luxor Properties the absolute right to the develop the land.

[87] Furthermore, if indeed the agreement was for an outright sale, why did Luxor Properties warrant and undertake to the taxpayer in cl. 2.3 of the agreement that the total aggregate sale prices of the saleable space in the D project ("the aggregate value") shall not be less than RM100 million and that the total aggregate sale price of the saleable space of the first phase of the project shall not be more 50% of the aggregate value? And why did Luxor Properties also warrant and undertake that in the event that upon completion of the project, the aggregate value is less than RM100 million, Luxor E Properties shall compensate the taxpayer the shortfall in the taxpayer's entitlement under the agreement either in kind or in cash? Clause 2.3 of the agreement is reproduced below:

Clause 2: The Project

F ...

2.3 The Developer hereby warrants and undertakes that the total aggregate sale prices of the saleable space in the project (hereinafter called "the Aggregate Value") shall not be less than Ringgit Malaysia One Hundred Million (RM100,000,000.00) only and that the total aggregate sale price of the saleable space of the first phase of the project shall not G be more than fifty per centum (50%) of the Aggregate Value. In the event that upon completion of the project, the Aggregate Value is less than Ringgit Malaysia One Hundred Million (RM100,000,000.00) only, the Developer shall compensate the landowner the shortfall in the landowner's entitlement under this agreement either in kind or in cash.

H **[88]** Surely, if the agreement was an outright sale of the land, Luxor Properties would be the owner of the land. As the owner of the land, Luxor Properties would not have to warrant and undertake to the taxpayer the aggregate value of the project that it will be developing on the land that it owns, and surely Luxor Properties would not agree to compensate the I taxpayer if the aggregate value of the project is less than RM100 million. Why would it matter to the taxpayer as the vendor of the land? How much is the aggregate value of the project that the purchaser will build on the land

after the outright sale of the land to the purchaser? The aggregate value of the project would only matter to the taxpayer if the agreement was a joint venture agreement where the consideration to be received by the taxpayer is tied to the agreed value of the project. The agreement does not state a fixed figure that Luxor Properties is to pay for the land. Instead, cl. 8.1 states that the landowner shall be entitled to 20% of the aggregate sale prices of the saleable space of the first phase of the project and 25% of the aggregate sale prices of the saleable space of each subsequent phase of the project. Clause 8.1 is reproduced below:

Clause 8. Entitlements

8.1 The landowner shall be entitled to:

8.1.1 Twenty per centum (20%) of the aggregate sale prices of the saleable space of the first (1st) phase of the project; and

8.1.2 Twenty-Two Point Five per centum (22.5%) of the aggregate sale prices of the saleable space of each subsequent phase of the project;

(hereinafter collectively called "the landowner's Entitlement")

8.2 The landowner's entitlement to the first (1st) phase of the project as provided in Clause 8.1.1 hereof shall first be utilised to settle all advances made or deemed to be made by the Developer to the landowner under this agreement whether by way of payment to the Existing Chargee, Subsequent Financier or otherwise at any time and from time to time and moneys owing or payable by the landowner to the Developer (such advances and moneys shall hereinafter be collectively called "the Advances").

[89] Further, if the agreement is an outright sale of the land, why did the taxpayer, in cl. 3.1.1 of the agreement, agree that all the payments made by Luxor Properties to the taxpayer for the interest paid by the landowner to the existing chargee of the land, OCBC Bank (Malaysia) Berhad, shall be deemed to be "advances" from Luxor Properties to the taxpayer? cl. 3.1.1 is reproduced below:

Clause 3: Developer's Covenants and Undertakings

3.1 In consideration of the premises and of the landowner's covenants hereinafter contained the Developer agrees and covenants with the landowner as follows:

3.1.1 to pay the landowner the interest paid by the landowner to the Existing Chargee [OCBC Bank (Malaysia) Berhad] for the months of September, October, November and December, 1998 and to pay and continue to pay to the Existing Chargee for and on behalf of the landowner all interest accruing from and payable by the landowner to the Existing Chargee from the 1st day of January, 1999 and the landlord hereby agrees that all moneys paid

A by the Developer to the landowner and the Existing Chargee as above stated are and shall be deemed to be advances from the Developer to the landowner which the landowner shall repay in accordance with the provisions of Clause 7 hereof.

[90] Furthermore, the taxpayer agrees to repay Luxor Properties the B advances in accordance with cl. 7 of the agreement. In cl. 7.2 of the agreement, the taxpayer expressly agrees that "all monies paid at a time and from time to time" by Luxor Properties or from the sale proceeds of the project or any part thereof to OCBC Bank (Malaysia) Berhad or a subsequent financier (defined in cl. 7.1 as "any financier who refinances the outstanding C loan (RM9,500,000) or balance thereof") for the outstanding loan or the subsequent loan (defined in cl. 7.1 as "loan granted to refinance the outstanding loan or balance thereof") shall and are deemed to be "advances" to the taxpayer and that the taxpayer agrees and undertakes to repay to Luxor Properties the advances in accordance with the agreement. And under cl. 11.2.3 of the agreement, even if the taxpayer terminates the agreement D because of Luxor Properties' breach of the terms and conditions of the agreement, the taxpayer agrees to forthwith refund to Luxor Properties all the advances, except for the interest paid by Luxor Properties to OCBC Bank or the subsequent financier in respect of the outstanding loan or subsequent loan.

E

[91] Surely if the agreement is an outright sale of the land to Luxor Properties, and monies owing by Luxor Properties are accrued as income for the basis period of 1999, Luxor Properties will be the beneficial owner of the land. If that is indeed the case, it is curious why the taxpayer would F expressly agree in cl. 7.2 of the agreement that all monies paid by Luxor Properties to OCBC Bank and any subsequent financier of the outstanding loan or the subsequent loan on the land, are deemed as an advance to the taxpayer and that the taxpayer will repay the monies paid by Luxor Properties for the outstanding loans to the banks on the land. Clause 7 of the agreement is reproduced below:

G

Clause 7: Advances by Developer

7.1 Both parties hereto agree that the Existing Chargee [OCBC Bank (Malaysia) Berhad] or any other financier who refinances the Outstanding Loan [RM9,500,000.00] or balance thereof (hereinafter called "Subsequent Financier") may require the sale proceeds of the project or H any part thereof to be utilised to settle progressively the Outstanding Loan or loan granted to refinance the Outstanding Loan or balance thereof (hereinafter called "the Subsequent Loan") in additional to the monthly interest payable in respect of such loans.

7.2 The landowner hereby agrees that all moneys paid at a time and from I time to time by the Developer or from the sale proceeds of the project or any part thereof, not being part of the landowner's Entitlement defined in Clause 8.1 hereof, to the Existing Chargee or the Subsequent Financier

shall and are deemed to be advances to the landowner who hereby agrees and undertakes to repay the same to the Developer in accordance with this agreement.

7.3 Subject to the provisions of Clause 11 hereof, the landowner shall forthwith repay to the Developer all advance made or deemed to be made by the Developer to the landowner under this agreement whether under this provision or otherwise in the event that the project is not completed or this agreement terminated for whatsoever reasons.

[92] Accordingly, from my interpretation of the agreement based on the applicable legal principles of construction of contracts, I find that the agreement is a joint venture agreement between the taxpayer and Luxor Properties whereby the latter agreed to develop the project on the land in accordance with the terms and conditions of the agreement.

Is The Agreement A Conditional Contract?

[93] Clause 6.1 of the agreement reads as follows:

Clause 6: Conditions Precedent

6.1 The Developer's obligation to develop the project on the said land is conditional upon the occurrence and fulfilment of the following:

6.1.1 all the necessary approvals, licenses and permits necessary for or in connection with the project shall be granted on terms satisfactory to the Developer within two (2) years from the date of this agreement;

6.1.2 the Developer is able to procure a loan of not less than Ringgit Malaysia Eight Million (RM8,000,000.00) only from a duly licensed financial institution in relation to Phase 1 of the project within One (1) year from the date of this agreement;

6.1.3 without prejudice to the generality of provisions of Clause 6.1.1 hereof, the relevant authorities do not:

(a) impose any condition on the Developer requiring the Developer to upgrade any [of] the roads leading to and around the project into a dual carriageway;

(b) agrees to approves and/or stipulates a plot ratio no less than five per centum (5%) below 5:2; and

6.1.5 the relevant authorities approve the plans and/or amended plans submitted and/or to be submitted by the Developer without major modification and/or variation.

6.2 Notwithstanding the above, the Developer shall be entitled to waive any of the conditions precedent in Clause 6.1 hereof by giving a written notice to the landowner of such waiver and upon such waiver by the Developer, the condition(s) precedent specified in such notice shall be required to be fulfilled and the Developer shall develop the project on the terms and conditions contained in this agreement upon fulfilment or occurrence of the remaining conditions precedent specified in Clause 6.1 hereof.

[94] The taxpayer's case is that the agreement is not a conditional contract because all the conditions precedent in cl. 6.1 are promissory conditions. Learned counsel for the taxpayer submitted at length on the difference between promissory conditions and contingent conditions and went into great detail as to how the SCIT had misread Lord Denning's judgment in the English case of *Trans Trust SPRL v. Danubian Trading Co Ltd* [1952] 2 QB 297. He then went on to discuss the passage in para. 1.21 on p. 28 of the SCIT's decision in the case stated, where it said that Luxor Properties' procurement of a loan is a condition precedent, not to the formation of the contract, but to the obligation of Luxor Properties to pay the taxpayer the consideration for the land.

[95] With respect to learned counsel for the taxpayer, nowhere in the case stated did the SCIT make a finding of fact that the condition precedent in cl. 6.1 of the agreement is a contingent condition or a promissory condition. The finding of fact made by the SCIT in para. 1.24 at p. 29 of the case stated was that as the development order was only obtained on 28 May 2001 and as it is the last of the conditions precedent to be fulfilled, the DGIR was right to treat the agreement as a conditional agreement and was correct in raising the assessment for YA 2001 upon the fulfilment of all the conditions precedent. The SCIT had stated in para. 1.24 that the obtaining of the development order is a fundamental term and a condition precedent of the agreement because only with the approval of the development order could Luxor Properties fulfil its warranty to the taxpayer in cl. 2.3 of the agreement that the aggregate value of the project will not be less than RM100 million as ultimately the gross development value of the project was RM133,379,860, which the taxpayer's witness, AW2, admitted was not finalised as at 2 February 1999.

[96] To support the taxpayer's case that the conditions in cl. 6.1 are only promissory conditions and not conditions precedent, Datuk Naban submits in para. 16(b) of his written submission that:

> Luxor Properties had performed the terms of cl. 3.1 notwithstanding that the conditions in sub-clauses 6.1.1 to 6.1.4 were yet to be fulfilled, such as:
>
> (i) reimbursing the appellant for the interest incurred between October and December 1998 (*ie*, Clause 3.1.1);
>
> (ii) appoint the relevant consultants to prepare the layout plans and building plans (*ie*, Clause 3.1.2); and
>
> (iii) pay quit rent and assessment for the land (*ie*, Clause 12.2.).

[97] With respect to learned counsel for the taxpayer, his submission that Luxor Properties "had performed all the terms of cl. 3.1 notwithstanding that the conditions in sub-cls. 6.1.1 to 6.1.4 were yet to be fulfilled" is not

entirely accurate. Luxor Properties had not and could not perform all the terms in cl. 3.1, prior to the issuance of the development order and the approval of all the plans for the development of the project.

[98] Pursuant to 3.1, Luxor Properties had agreed and covenanted with the taxpayer to perform the activities stipulated in sub-cls. 3.1.1 to 3.1.10. Prior to the issuance of the development order by the local authorities, Luxor Properties could not perform and did not perform the requirement in cl. 3.1.3, since it could only by law commence the construction of the buildings in the project after the approval of the building plans, layout plans *etc*, and the development order issued by the local authority. Luxor Properties' obligation in cl. 3.1.3 is expressly subject to "the local or other relevant authorities having approved the building plans, layout plans, specifications, and other plan or plans and having granted permission for the commencement of work having granted all requisite approvals in respect of the project."

[99] Without the development order and the planning approvals, it was impossible for Luxor Properties to have commenced the construction of the project. And without commencing the construction of the project, it is impossible for Luxor Properties to construct and complete the project under sub-cl. 3.1.7 and to complete the construction of the project within 36 months from the last launch of the project under cl. 3.1.10. Sub-clauses 3.1.3, 3.17 and 3.1.10 are reproduced below:

Clause 3: Developer's Covenants and Undertakings

...

3.1.3 subject to the local or other relevant authorities having approved the building plans, layout plans, specifications, and other plan or plans and having granted permission for the commencement of work having granted all requisite approvals in respect of the project, the Developer shall:

(a) commence in a workmanlike manner the construction of the buildings in accordance with the plans approved by such authorities;

(b) complete construction in accordance in all respects with approved plans and specifications and shall construct all roads, drains, backlanes, culverts and sanitary installations thereto in accordance with approved plans and to the standard required by the relevant local authority and other authorities;

(c) obtain for each of the said units in the project a Certificate of Fitness for Occupation from the relevant local authority and the relevant Architects' Certificate to the effect that the construction of the units have been completed;

(d) prepare and submit the necessary applications for issuance of the individual titles for each of the units constructed in the project in accordance with the Strata Titles Act 1985;

A ...

3.1.7 to construct and complete the project in accordance with the approvals of the relevant authorities and in a good workmanlike manner in accordance with generally accepted building standards;

B 3.1.8 to comply with all the provisions and requirements of the law and regulations for the time being in force in respect of the development of the project and to indemnify the landowner and keep the landowner indemnified against all fines, penalties and losses incurred by the landowner by reason of breach by the Developer of this Clause;

C ...

3.1.10 to complete the construction of the project within thirty six (36) calendar months from the date of the last launch of the project.

[100] Although cl. 6.2 of the agreement states that Luxor Properties is entitled to waive any of the conditions precedent in cl. 6.1 by giving a written D notice to the taxpayer of the waiver, the law is settled that a condition precedent required by law or policy cannot be waived. The Federal Court in *Chase Perdana Bhd v. Md Afendi Hamdan* [2009] 6 CLJ 501; [2009] 6 MLJ 783, FC, held that conditions in a contract, which are required by law or policy, cannot be waived and that such a waiver is contrary to public policy under s. 24 of the Contracts Act 1950.

E

[101] The conditions in sub-cl. 6.1.1 of the agreement are required by law. Luxor Properties cannot commence the development of the project until it obtains all the necessary approvals, licenses and permits. Section 19 of the Town and Country Planning Act 1976 expressly prohibits development without planning permissions. It states:

F

19. Prohibition of development without planning permission

(1) No person, other than a local authority, shall commence, undertake, or carry out any development unless planning permission in respect of the development has been granted to him under s. 22 or extended under G subs. 24(3).

[102] Notwithstanding his lengthy submission on the distinction between contingent conditions and promissory conditions, learned counsel for the taxpayer chose not to submit on the statement made by the SCIT, in para. 1.23 at p. 28 of the case stated, namely, that the development order is H a condition required by law and that without the development order to build the property on the land sold *via* the agreement, Luxor Properties would not have been able to carry out any development and no payment as provided in cl. 8 of the agreement could have been made to the taxpayer.

[103] As held by the Federal Court in *Sharidal* (*supra*), the approval from the I FIC is a contingent condition because it is a condition required by law and the contract for the sale of property cannot take effect unless and until the condition is fulfilled *ie*, the FIC approval obtained. Similarly, the

development order and all the necessary approvals, licence and permits for the development of the project are required by law *ie*, the Town and Country Planning Act 1976. I agree with the SCIT that without the development order, Luxor Properties would not be able to develop the project.

[104] For this reason, I find that the condition in cl. 6.1.1 is a contingent condition. Accordingly, pursuant to s. 33(a) of the Contracts Act, the agreement is a conditional contract.

[105] In my considered view, it is clear that the conditions in cl. 6.1 consists of both contingent conditions and promissory conditions, and not just promissory conditions as claimed by the taxpayer.

[106] Accordingly, this court finds that the SCIT's finding of fact that the agreement is a conditional agreement and that the condition was fulfilled on 28 May 2001, when the development order was obtained, was correct in law. In my judgment, it would be a strain on the language of the agreement, if this court were to agree with the taxpayer that the agreement is not a conditional agreement.

Was The DGIR Correct To Have Issued The Assessment For YA 2001 Against The Taxpayer?

[107] Under s. 91(1) of the ITA, the DGIR if it appears to him that either no assessment or no sufficient assessment had been made on a person for any year of assessment, within six years from that year of assessment, the DGIR can make an assessment or additional assessment, in respect of the additional amount of chargeable income or in the additional amount of tax in which the assessment, with respect to that person, ought to have been made for that year of assessment.

[108] Notwithstanding the six-year limitation period in s. 91(1) of the ITA, under s. 91(3), the DGIR may make an assessment any time after the six-year limitation period in respect of that person for any year of assessment "for the purpose of making good any loss of tax attributable to the fraud, wilful default or negligence in question" if it appears to the DGIR that (a) any form of fraud or wilful default has been committed by or on behalf of that person; or (b) that person had been negligent "in connection with or in relation to tax".

[109] The issue for determination before the SCIT was whether the taxpayer had committed fraud, wilful default or had been negligent in not recognising the income under the agreement in YA 2001 for the purposes of s. 91(3) of ITA.

[110] At the conclusion of the appeal before it, the SCIT found that the taxpayer was negligent or had committed wilful default in failing to report to the DGIR the income received under the agreement when submitting its returns within the prescribed time for YA 2001. The SCIT found that as the

taxpayer's tax agent had informed the DGIR on 27 January 2006 that the entire consideration under the agreement should have been recognised as income in basis year of 1999, the DGIR was able to exercise his power under s. 91(3) of ITA to raise assessments against the taxpayer in respect of its neglect or default in reporting the income.

[111] As stated in section C(I) of this judgment, the taxpayer's case is that the SCIT's decision that the taxpayer was negligent and had committed wilful default in relation to its submission of its tax returns was wrong in law. Learned counsel for the taxpayer submits that the DGIR had failed to show that the taxpayer was negligent or had committed wilful default, so as to issue the assessment for YA 2001 outside the six-year limitation period.

[112] Whereas the DGIR's case is that the SCIT's decision was correct in law. The learned SRC submits that the taxpayer had neglected to inform the DGIR of the sale of the said land and had also committed wilful default in not reporting the outright sale as claimed by them to be in 1999 but had instead reported the transaction as a joint venture agreement in its audited accounts for years 1999 to 2005. The taxpayer had never declared the transaction between the taxpayer and Luxor Properties as an outright sale in 1999, nor did it declare the income received under the agreement of RM28,343,220 in YA 2001 when the conditions precedent to the agreement were fulfilled.

[113] As discussed in section D(II) above, pursuant to the amendments to ITA by the 1999 Amendment Act (No. 2) and the 2002 Amendment Act, the DGIR is deemed to have made an assessment of the amount of tax based on taxpayer's self-assessment in tax returns for YA 1999 to YA 2004.

[114] Since the taxpayer had declared that it had suffered losses in its tax returns for YA 1999 to YA 2004, there was no tax payable by taxpayer for those years of assessment. The SCIT found that "In the appellant's reports and accounts, the appellant had clearly declared that it had only losses from the year ended 30 June 1999 till 2005 and so no income tax is chargeable on the appellant as per the returns submitted by the appellant."

[115] Prior to 1 January 2000, the period for the issuance of assessment or additional assessment by the DGIR was 12 years. It was reduced to six years with effect from 1 January 2000 pursuant to the amendment made to s. 91 of ITA by s. 15 of the Finance Act 1998 (Act 578). It was further reduced to five years with effect from 10 January 2013 pursuant to the amendment made to s. 91 of ITA by s. 26 of the Finance Act 2013 (Act 755).

[116] Accordingly, at the time the DGIR had issued the assessment in 2010 against the taxpayer in respect of its income for YA 2001, the limitation period for which the DGIR was to issue the assessment was six years from the YA 2001.

[117] The Supreme Court in *Chong Woo Yit v. Government Of Malaysia* [1989] 2 CLJ 87; [1989] 1 CLJ (Rep) 9; [1989] 1 MLJ 473 per Gun Chit Tuan SCJ held that:

> ... for the purposes of an assessment or additional assessment of tax under s. 91 of the Income Tax Act 1967, not made in any year of assessment or within twelve years after its expiration, the revenue would still have to show that fraud or wilful default has been committed or that any person has been negligent in connection with or in relation to tax for that year of assessment.

[118] The High Court in *Government Of Malaysia v. Gan Chuan Lian* [1992] 1 CLJ 678; [1992] 2 CLJ (Rep) 424; [1992] 1 MLJ 449, HC, following the Supreme Court's decision in *Chong Woo Yit v. Government of Malaysia* held that the burden is on the DGIR to show that fraud, wilful default or negligence had been committed. Mohd Noor Ahmad J (as he then was) cited with approval the judgment of Arulanandom J is *Government Of Malaysia v. Ng Song Choon* [1974] 1 LNS 41; [1975] 1 MLJ 131, where he held:

> In this case the plaintiff relies on s. 91(3) for the legality and validity of its assessments but s. 91(3) only gives the Director General a right to impose tax for any year of assessment where it appears to him that (a) any form of fraud or wilful default has been committed by or on behalf of any person; or (b) any person has been negligent. As this is a penal law it must be construed strictly and therefore the courts can only pronounce judgment on the claim if the claim is supported by allegations of fraud or wilful default or negligence. It is true that it is not for the Director General to disclose any of these things to the taxpayer when he makes the assessment but if he seeks to obtain judgment of the court the court must be satisfied that there was fraud or wilful default or negligence on the part of the taxpayer before it can decide whether the assessment was barred by limitation. It is essentially a legal issue and it falls outside the scope of s. 106(3) ...

[119] The question of law for this court is whether based on the facts in the case stated, the DGIR had proven that the taxpayer had committed wilful default or had been negligent in not recognising the income under the agreement in YA 2001 for the purposes of s. 91(3) of the ITA.

[120] At para. 153 on p. 43 of the case stated, the SCIT had addressed the taxpayer's submission that the DGIR had failed to put its case to the taxpayer's witness, AWI, that the taxpayer was negligent during cross-examination. In response to this submission, the SCIT stated:

> There is no necessity for the parties to cross-examine its witnesses on each of those documents or statement made by its witnesses on each of those documents or statement made by its witnesses on each of those documents or statement made by its witnesses where no explanation is needed for those documents. In fact, many appeals before the Special Commissioners of Income Tax had proceeded based merely on the documents, accounts and returns that were filed without the calling of

A any witnesses. I had made a finding of fact that the appellant had failed to submit correct returns to the Respondent as is required by statute in 1999 if it had entered into an outright sale as alleged by the appellant based on the documents filed and those documents are undisputed by both the parties.

B **[121]** In his written submissions in this instant appeal, learned counsel for the taxpayer submits the SCIT "had clearly no basis to disregard the respondent's failure cross-examine". He said:

> The SCIT's statement clearly runs contrary to the existing principle (*albeit* with exceptions) as enunciated by the Federal Court in *Wong Swee Chin* C *v. PP* [1981] 1 MLJ 212, that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony.

[122] With respect to learned counsel for the taxpayer, there are two reasons why I cannot agree with his submission. I also note that counsel's submission of the Federal Court's decision in the case of *Wong Swee Chin v. PP* [1980] D 1 LNS 138; [1981] 1 MLJ 212 is not entirely accurate as to what was held by the Federal Court in its judgment. Raja Azlan Shah CJ (Malaya) (as HRH then was) in delivering the judgment of the court said the following at p. 213 in respect of failure to cross-examine a witness:

> Mr Jagjit Singh also raised as one of his main grounds of appeal that the E trial judge erred in law when he held that the failure of the defence to cross-examine the two prosecution witnesses on the ammunition actually found in the trouser pockets of the appellant at the time of his arrest (the subject-matter of the third charge) constituted a clear admission of the charge of possession by the appellant. We consider that statement of the law as a misdirection. *A correct statement of the law is that failure of the* F *defence to cross-examine the prosecution witnesses on the matter merely goes to the credibility of their testimony*, to wit, the fact that they found the ammunition in the appellant's trouser pockets remains unshaken. *On this point we need only say there is a general rule that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony. But as is common with all general rules there are also exceptions* as pointed out in the G judgment of the Supreme Court of New Zealand in *Transport Ministry v. Garry* [1973] 1 NZLR 120, ...
>
> (emphasis added)

[123] The first reason why I cannot agree with Datuk Naban's submission H is because the SCIT is not a court. The SCIT, as described by the Federal Court in *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case* [2017] 5 CLJ 526; [2017] 3 MLJ 561; [2017] 4 AMR 123, is an inferior tribunal performing a function, which is judicial or *quasi*-judicial in nature. As explained by Zainun Ali FCJ at para. 53 of the Federal Court's judgment: I

> [53] Before discussing the dialectics of judicial power, a brief outline on the exigencies of judicial function would be helpful. Other than the civil courts, bodies such as the Industrial Court, the Special Commissioner of

> Income Tax, as well as other inferior tribunals, perform a function which is judicial or *quasi*-judicial in nature. They can grant orders such as *certiorari*, *mandamus* etc. Thus, it is recognised that judicial functions (as opposed to judicial powers) are not the monopoly of the Judiciary. These inferior tribunals are necessary and they exist to lend weight to their specialist skills in issues which come up before them. The adjudicators of these inferior tribunals are, for the most part, lay persons and so their adjudicative powers are confined to their relevant spheres.

[124] A "court" is defined in s. 3 of the Interpretation Acts 1948 and 1967 ("Interpretation Acts") to mean "a court of competent jurisdiction". Section 8(1) of the Interpretation Acts states that a reference to "the High Court" is "a reference, in relation to any particular case, to whichever of the High Courts established by the Federal Constitution has jurisdiction in that case."

[125] The examination of witnesses is governed by the Chapter X of the Evidence Act 1950. Section 2 of the Evidence Act expressly states:

> **This Act shall apply to all judicial proceedings in or before any court**, but not to affidavits presented to any court or officer nor to proceedings before an arbitrator. (emphasis added)

[126] Section 2 of the Evidence Act does not expressly state that the Act does not apply to proceedings before the SCIT. However, the SCIT, similar to an arbitral tribunal, is an inferior tribunal; it is not a court. Hence, it follows that the Evidence Act also does not apply to proceedings before the SCIT.

[127] Therefore, as the Evidence Act does not apply to proceedings before the SCIT, it follows that provisions relating to the examination of witnesses, including cross-examination, in the Evidence Act as well as case law on examination of witnesses do not apply to hearings before the SCIT.

[128] The second reason why I am unable to agree with learned counsel for the taxpayer is that the hearing of appeals to the SCIT is made pursuant to Schedule 5 of the ITA.

[129] Paragraph 22 of Schedule 5 of ITA empowers the SCIT to regulate the hearing of an appeal and their own procedure. Paragraph 22 states:

> Procedure
>
> 22. Subject to this Act and any rules made under paragraph 154(1)(d), the Special Commissioners may regulate the procedure at the hearing of an appeal and their own procedure.

[130] As regards witnesses and evidence presented during the appeals before the SCIT, para. 19 of Schedule 5 of the ITA states that the SCIT shall have:

> (a) power to summon to attend at the hearing of an appeal any person who in their opinion is or might be able to give evidence respecting the appeal;

A (b) power, where a person is so summoned, to examine him as a witness on oath or otherwise;

...

(f) subject to subs. 142(5), power to admit or reject any evidence adduced, whether oral or documentary and whether admissible or inadmissible under the provisions of any written law for the time being in force relating to the admissibility of evidence;

[131] Hence, in proceedings before it, the SCIT has the power to summon or not to summon any witness to attend the hearings. It also has the discretion to admit or reject any evidence adduced, whether oral or documentary and whether admissible or inadmissible under any written law. This power is only subject to subs. 142(5) of the ITA which provides that nothing in the ITA (i) will affect the operation of Chapter IX of the Evidence Act, *ie*, the provision in the Act governing witness *eg*, who may testify as a witness, and (ii) be construed as requiring a person to produce in court, the SCIT, the DGIR or an authorised officer, privilege documents except for the type of documents in sub-s. 142(5)(b) which shall not be privileged from disclosure to a court, the SCIT, the DGIR or an authorised officer.

[132] The learned SRC submits that the proved facts in para. 7.2 of the case stated and the finding of facts at pp. 18 to 27 of the case stated confirms that the taxpayer had indeed committed wilful default and negligence, thus the DGIR was authorised to raise the assessment.

[133] She argues since 1999, the taxpayer had neglected to inform the DGIR that it had sold its land to Luxor Properties and that it seeks to have all the proceeds from the agreement recognised on an accrual basis for the basis period of 1999. Only on 27 January 2006, after the lapse of close to seven years from the date of the agreement did the taxpayer inform the DGIR that there had been an outright sale in 1999. For these reasons, the learned SRC argues that the assessment issued by the DGIR was lawful and valid.

Was The Taxpayer Negligent And/Or Had Committed Wilful Default In Respect Of The Filing Of Its Tax Returns For YA 2001?

[134] The term "negligence" and "wilful default" is not defined in the ITA. Hence, this court has to refer to case law and academic texts on revenue law to ascertain for purposes of revenue laws what has been defined as "negligence" and "wilful default".

[135] *Whiteman on Income Tax* (3rd edn) at p. 1361 defines "neglect" as:

> Neglect means negligence or failure to give any notice, make any return, statement of declaration or to produce or furnish any list, document or other information required by the Income Tax Acts.

[136] "Negligence" is defined in the English case of *Blyth v. Birmingham Waterworks* (1856) 11 Ex Ch 781, 156 ER 1047 as "omission to do something which a reasonable man would do or doing something which a prudent and

reasonable man would not do." *King v. Walden (HM Inspector of Taxes)* [2001] STC 822, [2001] 5 WLUK 477 held that neglect exists where inadequate returns are made by a taxpayer of matters within his own knowledge.

[137] In *Knight v. Inland Revenue Commissioners* [1973] 3 All ER 721; [1974] STC 156; [1973] 7 WLUK 101; 49 TC 179; [1974] TR 19, the UK Court of Appeal affirmed Goff J's decision that the words "loss of tax" in s. 229(3) of the UK's Income Tax Act 1952 meant "income which had not been taxed as a result of the taxpayer having failed in his duty to make a return, or a correct return". In that case, the High Court upheld the Special Commissioners' determination that from February 1953 onwards, tax was being lost as a result of the taxpayer's failure to make proper returns and to disclose his own and his mother's accounts. Therefore, the loss was due to his wilful default and the surtax assessments by the revenue had been validly made.

[138] In *Regina v. Special Commissioners of Income Tax (ex parte Martin)* [1973] 1 WLUK 491; 48 TC 1 (referred to by the SCIT in *ADSB v. Ketua Pengarah Hasil Dalam Negeri* [2011] AMTC 1242), the UK Court of Appeal held that failure to disclose profits for a taxpayer's business amounted to fraud or wilful default.

[139] What is wilful default? Learned counsel for the taxpayer submits that as explained by the *Wharton's Law Lexicon*, wilful default "simply implies intention or conscious violation of obligation". In the English case of *Hudson v. Humbles* 42 TC 380, Pennycuik J held that to establish a *prima facie* case of wilful default within the provisions of s. 47(1) of the UK's Income Tax Act 1952, it is not necessary for the Inland Revenue to show the particular quality of the source: it is sufficient if the Inland Revenue shows a receipt in the nature of income by the taxpayer and a failure by the taxpayer to give a satisfactory account of it. Section 47(1) of the UK's Income Tax Act 1952 allows the Inland Revenue to issue an assessment or additional assessment beyond a six-year limitation period if there was any form of fraud or wilful default committed by or on behalf of a taxpayer. Section 47(1) is in *pari materia* with s. 91(3) of the ITA save that s. 91(3) allows the DGIR to issue an assessment or additional assessment not just for fraud and wilful default but also, negligence.

[140] In this instant appeal, it is a proven fact that prior to 27 January 2006, the taxpayer had never declared or reported any income from the agreement. All the annual accounts of the taxpayer from 1999 to 2004 did not show any gain or income from the sale of its land under the agreement.

[141] Under the self-assessment regime that took effect on 1 January 2000 for YA 2001, the taxpayer was required to submit to the DGIR within six months after the close of its accounting period, its tax returns together with its audited accounts for that year of assessment. The DGIR under s. 90 of

A the ITA is deemed to have made an assessment of the tax payable based on the amount of income declared by the taxpayer in his tax returns filed for that year of assessment.

[142] Pursuant s. 77B of the ITA, a company may submit revised tax returns no later than six months from the due date for furnishing the tax returns. B Thus, a company has one year to submit revised tax returns to the DGIR.

[143] In this instant case, the taxpayer in the tax returns that it had furnished to the DGIR for YA 2001, declared that it did not make any income for YA 2001. Therefore, under the deeming provision in s. 90 of the ITA, the DGIR is deemed to have made an assessment that there was no tax payable by the C taxpayer since the taxpayer had reported in its accounts and in its tax returns that it did not earn any income in YA 2001.

[144] The facts show that on 27 January 2006, the taxpayer had notified the DGIR that the agreement that it had entered in 1999 was an outright sale of D its land and that the income from the sale should be recognised in 1999 on an accrual basis. And that it had submitted on the same day revised tax returns and revised tax computations for YA 2003 and YA 2004 along with its letter notifying the DGIR that the income was earned in 1999.

[145] The SCIT found that although the taxpayer had notified the DGIR on E 27 January 2006 that the income received under the agreement was to be recognised in the basis period of 1999, the taxpayer has not submitted any revised tax returns to correct its submissions for YA 2000 (preceding year basis) – for income earned in the basis period of 1999, YA 2000 (current year basis) – for income earned in the basis period 2000, YA 2001 and YA 2002. F The SCIT had found that the revised tax returns that the taxpayer had submitted to the DGIR on 27 January 2006, were for YA 2003 and YA 2004.

[146] The taxpayer's appeal is premised on its contention that it is so clear and evident from the terms and conditions of the agreement, that the G agreement was for the outright sale of the land to Luxor Properties and that the income received from the sale should be recognised in the YA 1999.

[147] In *Employee v. Revenue and Customs Commissioners* [2008] STC (SCD) 688, it was held that in the context of s. 29(4) of the UK's Taxes Management Act 1970 ("TMA 1970"), negligent conduct by the taxpayer's advisers was H sufficient. Section 29(4) of the TMA 1970 states:

> (4) The first condition is that the situation mentioned in subsection (1) above is attributable to fraudulent or negligent conduct on the part of the taxpayer or a person acting on his behalf.

I **[148]** Section 91(3) of the ITA is wider than s. 29(4) of the UK's TMA 1970, in that under the ITA, the DGIR can make an assessment at any time for the purpose of making good any loss of tax attributable to the negligence of any

person, or fraud or wilful default committed by that person or on behalf of that person. Hence, under s. 91(3) of ITA, negligence by a taxpayer or fraud or wilful default committed by a taxpayer or on behalf of the taxpayer, is sufficient for the DGIR to make an assessment after the six-year limitation period.

[149] Based on these legal principles, failure to file correct tax returns of income earned in any year of assessment amounts to neglect and wilful misconduct. Even if the wilful misconduct was made by the taxpayer's agent on the taxpayer's behalf, under s. 91(3) of ITA, the DGIR may make an assessment outside the six-year limitation period for purposes of making good the loss of tax attributable to the tax agent's fraud or wilful misconduct or the taxpayer's negligence.

[150] Since, as submitted by learned counsel for the taxpayer that it was so clear that the agreement was for the outright sale of the land and the income earned in 1999, it was highly negligent of the taxpayer to have filed tax returns, prior to 27 January 2006, stating that it did not earn any income for the sale of the land.

[151] Therefore, based on legal principles in the case laws cited above and the facts as stated by the SCIT in the case stated, I am satisfied that the taxpayer was indeed negligent and/or had committed wilful default in deliberately not reporting the payments earned from the sale as income in the prescribed period, but instead to have continued, prior to 27 January 2006, to report in its annual accounts that the agreement was a joint venture agreement and in declaring in its tax return forms that it did not receive any income under the agreement in the basis periods of 1999, 2000, 2001, 2002, 2003 and 2004.

[152] Counsel for the taxpayer submits that prior to 27 January 2006 the taxpayer had declared in its tax returns that it did not receive any income under the agreement based on the advice that it had received from its advisors. If that was indeed the advice received, the taxpayer would have a cause of action in negligence or wilful misconduct, against its auditors for signing off on its annual audited accounts that there were only losses made in financial years 1999 to 2004 and against its tax agent for failing to report the income earned under the agreement in its tax return filed for YA 2001. In my view, it was negligent of the taxpayer's agent to have advised the taxpayer to declare in the tax returns filed for the basis period of 1999 to 2004 that the taxpayer did not receive any income for those years and for its auditors to have signed off on its audited accounts for those years that the taxpayer had not made any income (save for the RM7,000 from the sale of the motor vehicle). Alternatively, the tax agent acting on the taxpayer's behalf had committed wilful misconduct in failing to declare and to report in the tax returns the income earned by the taxpayer from the sale of the land.

[153] As discussed in section D of this judgment, pursuant to the self-assessment regime, the obligation is on the taxpayer under s. 77A of the ITA to submit the correct amount of income received in the tax returns furnished to the DGIR for every year of assessment beginning with YA 2001. By the taxpayer's own admission in its letter to the DGIR of 27 January 2006, it had failed to do so.

[154] For these reasons, this court is satisfied that the DGIR has proven that the taxpayer has committed wilful default or had been negligent in failing to declare the income received under the agreement in its tax returns for YA 2001. Hence, this court finds that the DGIR was not erroneous in making the assessment pursuant to s. 91(3) of ITA after the six-year limitation period.

[155] Accordingly, this court finds that the SCIT had not erred in law in upholding the DGIR's decision of issuing the assessment for YA 2001 in 2010.

Was The DGIR Correct In Imposing A Penalty Against The Taxpayer?

[156] The taxpayer's case is that the SCIT was erroneous in upholding the DGIR's decision to impose a penalty under s. 113(2) of the ITA against the taxpayer.

[157] Where a person makes an incorrect return by omitting or understating any income, if no prosecution had been instituted against the person under s. 113(1) of ITA, the DGIR is empowered under s. 113(2) of ITA to require that person to pay a penalty equal to the amount of tax undercharged in consequence of the incorrect return or incorrect information, or which would have been undercharged, if the return or information had been accepted as correct.

[158] By the taxpayer's own case, it had made an incorrect return for YA 2001. Learned counsel for the taxpayer submits that the tax return for YA 2001 was filed within the prescribed time.

[159] Yes, I agree that the taxpayer's tax return for YA 2001 was filed within the prescribed time. But the taxpayer had negligently and/or wilfully omitted to declare in its tax return for YA 2001 the income it had earned under the agreement. As found by the SCIT, the taxpayer's agent had filed on 27 January 2006 revised tax returns and revised tax calculations for YA 2003 and YA 2004. It had not filed a revised tax return for YA 2001, to report the income from the sale of the land to Luxor Properties under the agreement. Even if the taxpayer had filed a revised tax return for YA 2001 in January 2006, it would have been filed out of time. Under s. 77B of the ITA, the amended tax return must be made no later than six months from the due date of the tax return.

[160] The Court of Appeal in *Syarikat Ibraco-Peremba Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2015] 10 CLJ 114, [2017] 2 MLJ 120 held that the defence of good faith found in s. 113(1) of the ITA is not available in s. 113(2) and does not apply to the DGIR's discretion under s. 113(2) of the ITA. The Court of Appeal per Umi Kalthum Abdul Majid JCA held:

> [40] It is without doubt that s. 113(2) of the Act gives a discretion to the respondent to impose a penalty on a person who has failed to observe the requirements of the law as provided in para. 2(a) or (b) of s. 113. Hence the use of the phrase 'the Director General may require that person to pay a penalty'. There is a clear distinction between sub-s. 113(1) and sub-s. 113(2). Although paras. 113(1)(a) and (b) and paras 113(2)(a) and (b) are almost identical, but the effect of sub-s. 113(1) is different from sub-s. 113(2). Sub-section 113(1) provides for an offence being committed in the circumstance provided for in para (a) or (b) unless that person 'satisfies the court that the incorrect return or incorrect information was made or given in food faith'. *Whereas sub-s. 113(2) provides for a situation where there is no prosecution under sub-s. 113(1) has been instituted in the circumstances provided for in para. 113(2)(a) or (b), the Director General may require that person to pay a penalty. That being the case, the defence of 'good faith' as found in sub-s. 113(1), and not found in sub-s. 113(2), does not apply to the Director General's discretion under sub-s. 113(2).* We therefore disagree with the appellant's submission on this score.
>
> (emphasis added)

[161] For the above reasons, this court finds the SCIT was justified in law in reaching the conclusion that the DGIR had lawfully and correctly imposed upon the taxpayer the penalty under s. 113(2) of the ITA.

Decision

[162] For the reasons above, this court finds that on the facts in the case stated, the SCIT's decision was correct at law.

[163] Accordingly, the taxpayer's appeal is dismissed.